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Supreme Court of the United States

OCTOBER TERM, 1962

No. 877

EDGAR I. SHOTT, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

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IN THE

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No.

EDGAR I. SHOTT, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal from the Supreme Court of the State of Ohio

JURISDICTIONAL STATEMENT

Appellant Edgar I. Shott, Jr. appeals from a final judgment of the Supreme Court of the State of Ohio. The appeal presents the question whether Shott's conviction for violating the Ohio Blue Sky Law was consistent with the principles of due process as guaranteed in the Fourteenth Amendment to the Constitution.

OPINIONS BELOW

There were no opinions written below. Appellant was convicted in the Court of Common Pleas, Hamilton County, Ohio, for two violations of the Ohio Blue Sky Law. His conviction was affirmed by the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio; the judgment stated that the court found no error apparent on the record which was prejudicial to the Appellant (Appendix A). The Supreme Court of the State of Ohio dismissed Shott's subsequent appeal because "no debatable constitutional question" was presented (Appendix B).

JURISDICTION

Appellant was indicted and convicted on two counts for violations of the Ohio Blue Sky Law and sentenced to one to five years at hard labor in the Ohio State Penitentiary. The indictment charged, without any semblance of particularity, that Shott had violated all forty-five sections of the Ohio Securities Act, Ohio Rev. Code 1707.01-1707.45 (herein referred to as the "Ohio Blue Sky Law").

On June 27, 1962, the Ohio Supreme Court dismissed Shott's appeal, denied his motion for leave to appeal from the Ohio Court of Appeals, and entered judgment to that effect. A petition for rehearing, timely filed, was denied on October 3, 1962. On December 29, 1962, a notice of appeal to the United States Supreme Court was filed in the Ohio Supreme Court.

The jurisdiction of this Court to hear this appeal rests upon 28 U.S.C. § 1257(2). Should the Court determine that certain denials of federal Constitutional rights presented here are not proper subject

matter of an appeal, they should be considered as if contained in a petition for certiorari. 28 U.S.C. § 2103.

QUESTIONS PRESENTED

I. Whether the Ohio Blue Sky Law, as applied here to Appellant, violated due process of law,

(a) because the statute was so vague and indefinite (as evidenced by its application here) that it failed to provide notice to Appellant that his conduct was proscribed by the penal provisions of the Law, and

(b) because as applied here, it improperly and unconstitutionally placed the burden of proof upon Appellant and created an invalid statutory presumption.

II. Whether the prosecutor's closing argument deprived Appellant of due process of law.

THE STATUTE INVOLVED

The statute involved is the Ohio Securities Act, Ohio Rev. Code, §§ 1707.01-1707.45, and particularly sections 1707.01(B), (C)(1), (C)(2), (E)(1) and (E)(2); 1707.02(G); 1707.14(A), and (B)(2); 1707.30; 1707.44(A) and (C)(1); and 1707.45. The text of these sections is set forth in Appendix C.

STATEMENT OF THE CASE

The Appellant, Edgar I. Shott, Jr., is an attorney and a member of the bar of the State of Ohio. He has been charged with and convicted of a violation of the Ohio Blue Sky Law. Shott's "criminal" conduct which was found sufficient to violate the State securities law consisted of making one promissory note in a

single loan transaction with an old friend. He has been sentenced to serve one to five years at hard labor in the Ohio State Penitentiary.

1. The Indictment

The indictment, charging Appellant with violating the entire Ohio Blue Sky Law, related to a single transaction—Shott's delivery of a cognovit note to one Sestito as evidence of a personal loan which Sestito made to Shott. (See Indictment, Appendix D, *infra.*)[1] On the basis of that one transaction, Shott was charged (i) with *selling* securities without being licensed as a securities dealer[2] and (ii) with knowingly *selling* an unlicensed security.[3]

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[1] Since the record as filed in this Court is not paginated, references relate to the particular documents contained in the three bound volumes filed as the record herein: (i) "Common Pleas Court, Hamilton County, Bill of Exceptions," containing the trial transcript (referred to as "Tr. Trans."); (ii) "Appeal on Questions of Law," which contains, *inter alia*, briefs before the Ohio Court of Appeals (Appellant's brief: "Shott Br. Ct. App."), the Indictment, and Motion for New Trial; (iii) "Certified Transcript of Record," containing Notice of Appeal and briefs before the Supreme Court of Ohio (Appellant's briefs: "Shott Br. Ohio Sup. Ct." and "Shott Reply Br. Ohio Sup. Ct."; Appellee's brief: "State Br. Ohio Sup. Ct.").

[2] The first count of the Indictment (App. D) alleged that Appellant,

> ". . . did unlawfully sell . . . to Patrick Sestito, a security, to wit, a written instrument evidencing a promise to pay money, which the said Edgar I. Shott, Jr. . . . was not then and there licensed to sell securities in accordance with the provisions of the Ohio Revised Code 1707.01 to 1707.45. . . ."

[3] The second count (App. D) charged that Appellant,

> ". . . did knowingly, unlawfully and intentionally sell . . . to Patrick Sestito, a security, to wit: A written instrument evidencing a promise to pay money which security was not then

At the outset of the trial, Appellant, by demurrer, challenged the validity of the indictment (Tr. Trans. 2). He charged that the Ohio Blue Sky Law was so vague and indefinite as to be void under the due process clause of the Fourteenth Amendment.[4] The trial court, without benefit of oral argument, overruled the demurrer (Tr. Trans. 2).

2. The Evidence

The State's entire evidentiary case, consisting of the testimony of only two witnesses, is so brief that we have printed the complete transcript in Appendix E. The State's first witness was an Attorney Examiner for the Ohio Division of Securities who testified to the conceded facts that Shott was not a registered securities dealer and that the single promissory note which was the basis of the entire action was not registered with the Ohio Division of Securities[5] (Tr. Trans. 11-16; App. E 8a-11a).

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and there registered by description nor then and there registered by qualification in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45, inclusive, and which security and transaction was not then and there registered or exempted by Ohio Law. . . ."

[4] See certified copy of Demurrer and Memorandum in Support lodged with this Court.

[5] The note itself was introduced as State's Exhibit No. 1:

"$2250.00 Cincinnati, Ohio, September 28, 1960

Sixty (62) [*sic*] days after date for value received I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 dollars with Interest at the rate of ..... per centum per annum at ..... and I hereby authorize any Attorney at Law to appear in any Court of Record in the State of Ohio, or any other State in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me in favor of

The other witness, creditor Patrick Sestito, described the loan transaction. Sestito was a long-time friend of Shott's, and Shott had at least twice been his counsel (Tr. Trans. 26; App. E 19a). On September 28, 1960, as he often did, Sestito paid a casual social call on Shott (Tr. Trans. 7, 18, 22; App. E 12a, 15a). There were no advance arrangements made for Sestito's visit (Tr. Trans. 18; App. E 13a).

Sestito testified that when he went into attorney Shott's office, Shott said that he would like to borrow some money from him and would give Sestito 12½ per cent interest for the use of his money for 60 or 62 days' time (Tr. Trans. 17, 20, 29; App. E 12a, 14a, 19a); Sestito agreed to loan Shott $2,000, and the two parties decided to lump the principal and interest on the face of the note (Tr. Trans. 29-30; App. E 20a). Sestito, a layman, said in his direct testimony that he thought he had "invested" his money and that he considered the $250.00 return on the $2,000 loaned to Shott to be "profit" (Tr. Trans. 21; App. E 15a). However, in the same breath, Sestito acknowledged that he had entered into a promissory transaction, that he had "received a note for the money," and that the return on the $2,000 was "for the money he had placed with [Shott]" (Tr. Trans. 21, 22; App. E 15a).

Sestito testified that he loaned Shott the money strictly on the basis of his long acquaintance, personal

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the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal.

SHOTT INVESTMENT CO.
By: Edgar I. Shott, Jr.

No. .....
Due November 29, 1960"

friendship and his trust that Shott would pay the money back (Tr. Trans. 29, 31; App. E 20a).[6] It is clear from the face of the note and the testimony that there was no security for the loan except Shott's own reputation. (Tr. Trans. 29, 31; App. E 20a). The agreement did not contemplate the subsequent delivery of any stock or other securities to Sestito; nor did Sestito thereby gain an ownership interest in any corporation or other enterprise. Sestito acknowledged that Shott "didn't sell [him] anything." (Tr. Trans. 30; App. E 20a). Further, the State, on direct examination, brought out the fact that this was the *only* loan transaction between Shott and Sestito; it was subsequently established that the note was repaid in full. (Tr. Trans. 32, 25; App. E 21a, 17a). Thus, the loan was merely a single, isolated transaction between these two old friends.

The single Sestito loan transaction constituted the entire case for the State. There was no evidence, nor was there an intimation, that Shott was dealing in

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[6] Although the note was formally signed by the "Shott Investment Company," Sestito paid no attention to the formal signature. (Tr. Trans. 31; App. E 21a). Appellant's counsel in his opening statement had described this Company:

> "Now, the evidence will show that the note was signed, 'Shott Investment, by Edgar I. Shott, Jr.' Now, the Shott Investment Company, as the evidence will indicate, was a partnership, consisting of Edgar I. Shott, Sr., the Defendant's father, and Edgar I. Shott, Jr., the Defendant, Edgar I. Shott, Jr., as Trustee for Patricia Shott, Edgar I. Shott, Jr., as Trustee for his five-year old son, Gregory. The evidence will show the Defendant established this partnership upon the advice of an attorney specializing in tax laws in order to place income in the hands of various relatives for whom he wished to provide, and for the legitimate purpose of reducing his own income tax payments. That is all the Shott Investment Company was, or was ever intended to be." (Tr. Trans. 9).

traditional "securities"—stocks and bonds; nor was there even a scintilla of evidence in the record of Appellant dealing with any other person or entering into more than one loan transaction with Sestito.

It appears from the opening statement of Appellant's counsel it was his original intention to put Appellant on the stand in his own defense.[7] (Tr. Trans. 8-9). However, when the State rested its case solely on the testimony of the single Sestito loan, Appellant's counsel, believing that no Blue Sky conviction was conceivable on such a record, did not put Appellant on the stand or introduce further evidence. Appellant moved for a directed verdict; the trial court overruled this motion without permitting counsel even to present his arguments. (Tr. Trans. 37).

3. Prosecutor's Closing Argument

To the complete surprise of Appellant, the prosecutor, in his closing argument, introduced "evidence" of an alleged series of transactions which purportedly made the single Sestito loan a part of a "public offering of securities":

> "[The prosecutor]: Do you think this is a single transaction? Do you think this is the only time this occurred; that this piece of paper, this security, was sold by Ed Shott? You have heard evidence of one—
>
> "Appellant's counsel: I will object to that, Your Honor.
>
> "The Court: Objection overruled." (Tr. 50).

* * *

[7] Counsel had indicated that Appellant was prepared to testify as to the purpose to which he applied the money borrowed from creditor Sestito. (Tr. Trans. 8-9).

"[The prosecutor]: And there [Appellant] sits. For just one reason, because he can't look you in the eye. He can't tell you that, because it isn't so, because there was more than one transaction, there was a multiplicity of transactions, and that is where the crime has been committed." (Tr. Trans. 75).

The prosecutor repeatedly stated that, contrary to the evidence, there was a series of transactions constituting a public offering of Appellant's promissory notes. (Tr. Trans. 50, 51, 52, 53, 74, 75).

Having "introduced" in closing argument "evidence" of an alleged series of transactions, the prosecution then berated the Appellant for not taking the stand in his defense. For example:

"How could you have proof, how could you learn whether or not there was more than one sale? You could learn it only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on that witness stand and look you in the eye and say, 'Ladies and gentlemen of the Jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito.' He could tell you that, and he's got the burden of proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify." (Tr. Trans. 74-75).

". . . [I]f he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you

today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him, . . ." (Tr. Trans. 49-50).

4. The Court's Instructions

The trial court's instructions, in effect, directed a verdict against Appellant. The court charged that the State, by introducing evidence of the single loan transaction, had sufficiently proved Shott's violation unless *Appellant* proved that the single Sestito transaction was *not* part of a public offering of securities. The court charged (i) that as a matter of law the Sestito promissory note was a "security" within the contemplation of the Ohio Blue Sky Law and that it was not registered as required by statute (Tr. Trans. 85, 88); (ii) that Shott was a "dealer" required to be licensed by the State (Tr. Trans. 85); (iii) that under the Ohio Blue Sky Law, Shott's making the note and handing it to Sestito constituted the "sale of a security" (Tr. Trans. 30-31, 86); (iv) that, in effect, the statute establishes a standard of strict liability requiring no common law *mens rea* (Tr. Trans. 86, 87), and (v) that whether Shott thought the promissory note was not a security was immaterial (Tr. Trans. 86).

The Court correctly explained that the substantive provisions of the statute did not reach single, isolated transactions (Tr. Trans. 89). However, the Court stated the burden of proving that the single promissory note was not part of a public offering was on Appellant (Tr. Trans. 90); and further, that evidence of a single transaction was, by statutory presumption, sufficient to establish defendant's guilt. (Tr. Trans. 90).

The Appellant challenged such instructions on the ground, *inter alia*, that they improperly placed the

burden of proof on defendant (Tr. Trans. 95). The Court overruled such objections, and on the tendered instruction, the jury could do nothing other than find Shott guilty. He was subsequently sentenced to serve one to five years in the penitentiary.

Before the trial court and on successive appeals to the Ohio Court of Appeals and the Ohio Supreme Court, the Appellant explicitly charged that the Ohio Blue Sky Law under which he was convicted was invalid on its face and as applied under the due process clause of the Fourteenth Amendment because it set no ascertainable standard of conduct, required no specific intent, and was so indefinite and vague as to be void.[8] Further, Appellant has specifically challenged the wrongful imposition of the burden of proof upon him, the unlawful presumption, and the misconduct of the prosecutor in closing argument.[9] Although neither Ohio appellate court wrote an opinion, by their *per curiam* affirmances both courts necessarily rejected such constitutional arguments.

THE QUESTIONS ARE SUBSTANTIAL

The core question presented to this Court is whether the State's conviction of Edgar Shott was obtained consistently with the due process clause of the Fourteenth Amendment. We submit that the record demonstrates that constitutional guarantees of due process and fundamentally fair procedure were denied to Appellant Shott in at least three major respects: (i) the

[8] Trial Court: Demurrer and Memorandum in Support, Tr. Trans. 2, Motion for New Trial. Court of Appeals: Shott Br. Ct. App. 5-31. Supreme Court: Shott Br. Sup. Ct. 8-22.

[9] Trial Court: Tr. Trans. 95, 50, Motion for New Trial. Court of Appeals: Shott Br. Ct. App. 32, 60, 67-73. Supreme Court: Shott Br. Sup. Ct., 37-38, 55-56, 62-67.

statute, as expansively interpreted by the trial court, became so broad and indefinite (and so different from the statute as written) that Appellant could not have been on notice of any criminal implications of his conduct; (ii) to extricate himself from these indefinite prohibitions, the statute required the Appellant, rather than the State, to shoulder the ultimate burden of proof, and it permitted a conviction to be based solely upon a statutory presumption which cannot be deemed reasonable upon the evidence which the State submitted. Moreover, (iii) the prosecutor's closing argument to the jury unlawfully transgressed even the most liberal bound of fairness, and compounded the problems of defense against the indefinite charges in question.

I. THE STATUTE, BY REASON OF ITS VAGUENESS AND INDEFINITENESS, AS APPLIED TO APPELLANT, VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Statute Failed to Provide Appellant With Notice That His Conduct Fell Within Its Proscription.

1. It is Appellant's primary contention that the Ohio Blue Sky Law, as applied in this case, violated the "first essential" of due process of law—that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).[10] The essence of this fundamental safe-

[10] The predecessor Blue Sky Law, Ohio Gen. Code, § 6373-1 *et seq.*, repealed July 21, 1929, withstood a challenge in this Court in an appeal from a state civil proceeding. This Court held that the regulatory provisions of the law did not constitute a deprivation of property without due process, deny equal protection of the laws, or unlawfully burden interstate commerce. *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917). The issues raised in this appeal were not considered.

guard is that all persons are entitled to notice of the potential criminal conduct proscribed by the terms of a penal law. This Court recently restated this basic principle:

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Corp.*, No. 18, October Term, 1962 (February 18, 1963) (slip opinion p. 4).

Cf., *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

Under this due process standard, a statute will not pass constitutional muster if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Connally* v. *General Construction Co., supra*, 269 U.S. at 391. This Court has consistently held invalid both state[11] and federal[12] statutes which failed to provide such notice.

2. An examination of the record here will demonstrate that the relevant provisions of the Blue Sky Law never "informed [Appellant Shott] as to what the State commands or forbids." *Lanzetta* v. *New Jersey, supra*, 306 U.S. at 453. Consistent with the recent admonition of this Court that cases such as this should not be evaluated "in the abstract," *United States* v. *National Dairy Corp., supra*, at 3, reference to the record and the evidence is essential. In "determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which a

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[11] *E.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

[12] *E.g.*, *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921).

defendant is charged." *Id.*, at 4. Here, we have a clear measure of the conduct which the trial court by its instructions and the appellate courts by their affirmances necessarily found sufficient to constitute a violation of the Blue Sky Law. When one compares Shott's conduct with the terms of the statute under which he was convicted, it is clear that "men of common intelligence" would never have foreseen that a single loan transaction with a friend could conceivably constitute evidence sufficient to support a criminal conviction for violating the Law.

First, Appellant was convicted on the initial count because he did "sell securities" without "being licensed by the division of securities." Ohio Rev. Code § 1707.44. It is indeed true under the Ohio Law a person "acting as broker for others in the purchase or sale of securities" must be "licensed as a dealer by the division of securities." Ohio Rev. Code § 1707.14. As explicitly defined in the Code, a "dealer" is

> "every person, other than a salesman who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, *in the business of the sale of securities.*" Ohio Rev. Code § 1707.01(E)(1) (Emphasis added.)

Measured against the due process standard of "common intelligence," the Ohio statute provides no warning whatsoever that every citizen of the State of Ohio who, like Appellant Shott, is a debtor in a single loan transaction thereby becomes a securities "broker" or "dealer" subject to the penal provisions of the Blue Sky Law. Indeed, the state courts of Ohio have heretofore recognized that a "dealer" is one who makes *successive sales* of securities as a business, and that the State has not stated a cause of action against an alleged

"dealer" based upon a single sale. *State* v. *Stockman*, 21 Ohio App. 475, 153 N.E. 250 (1926). Nevertheless, the strained statutory interpretation permitted in this case disregarded the plain meaning of the words of the statute and the interpretive case-law; and the trial court charged that Appellant was, as a matter of law, a "dealer" required to be licensed by the State (Tr. Trans. 85).

Further, on the second count, Appellant was convicted of "knowingly and intentionally sell[ing] . . . any [unregistered] security . . . [which] is not exempt," that is, for selling "commercial paper and promissory notes . . . offered directly or indirectly to the public." Ohio Rev. Code §§ 1707.44(C)(1) and 1707.02(G). As applied to the evidence of Appellant's "criminal" conduct in this case, it is clear that the statute inadequately defines the conduct subsequently held to be criminal.

Shott's commonly understood act of "making a promissory note" became "selling a security" only by an extraordinary feat of verbal legerdemain. In its charge, the trial court first ruled that the Sestito promissory note was a "security" (Tr. Trans. 85, 88). Making the note became a "sale" because the definition of sale included a "disposition" and disposition—though not defined—meant any "transfer" (Tr. Trans. 85-86). It followed that Shott's (the maker's) act of *handling the note to Sestito* constituted, in the trial court's eyes, a "sale of a security" (Tr. Trans. 30-31, 85, 88). It is obvious that such an attenuated chain of judicial reasoning violates the most fundamental principle of strict construction of a criminal statute, *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), and so expands the "common understanding" of a "sale" be-

yond any reasonable and intelligible bounds.[13] Certainly such a definition of "selling a security" was not the "accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . ." *United States* v. *National Dairy, supra* at 7.

3. Thus, the critical criminal provisions of this statute under which Appellant was convicted provided no indication whatsoever of their bounds and, as interpreted here, are so indefinite that they violate due process. Moreover, the statute, as interpreted, does not require a criminal intent, guilty knowledge or a traditional *mens rea* (Tr. Trans. 86-87). Proof of such an intent might have avoided the constitutional charge of vagueness, for, as Mr. Justice Douglas has stated, "the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion). *E.g., United States* v. *National Dairy Corp., supra* at 6-7; *Omcechevarria* v. *Idaho*, 246 U.S. 343, 348 (1918); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502 (1925); *cf., Smith* v. *California*, 361 U.S. 147 (1959). See, Packer, "Mens Rea and the Supreme Court," *The Supreme Court Review, 1962*, 122-27.

Nor is there anything inherent in this simple and innocent every-day act of making a promissory

[13] State courts have consistently held unlawful the application of vague and indefinite statutory proscriptions in criminal actions for violation of state securities acts. *State* v. *Skinner*, 20 Ala. App. 204, 101 So. 327 (1924); *Groskins* v. *State*, 32 Okla. Cr. 197, 4 P. 2d 117 (1931); *People* v. *Pace*, 73 Cal. App. 548, 238 P. 1089 (1925). *Cf. Kneeland* v. *Emerton*, 280 Mass. 371, 183 N.E. 155 (1932).

note which would "alert the doer to the consequences of his deed" and make apparent the duty to register, this single cognovit note with the Securities Division of the State of Ohio.[14] *Lambert* v. *California*, 355 U.S. 225, 228 (1957). Thus,

> "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.*, at 229-30.

4. It is significant that in no case in any jurisdiction has there ever been a Blue Sky conviction solely for making a single promissory note. In every reported case that we have found dealing with transactions in promissory notes, there was invariably some additional element—either proof of dealing in outstanding notes; of repeated issuances; of a pattern of transactions involving fraud; or of the promise of the future delivery

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[14] Similarly, there was nothing in the legislative history or the interpretative cases which would indicate that the criminal provisions were aimed at Appellant's conduct. *United States* v. *National Dairy Corp.*, *supra*, at 5-6. Indeed, the background and the context were just to the contrary; the State did not intend to regulate single, isolated loan transactions. See, Harper, *Protection of Investors Under the Ohio Securities Act*, 23 U.Cin.L. Rev. 418, 426, 429, 437 (1954); Boesel, *Analysis of the Ohio Securities Act*, 5 West.Res.L.Rev. 352, 360 (1954); Nida, *The Ohio Division of Securities and The Ohio Securities Act*, 13 OhioSt.L.J. 427, 429-30 (1952); *Need For A New Blue Sky Law*, Report of the Committee on Judicial Administration and Legal Reform, 1 Ohio Bar No. 42, pp. 5, 13, 15, 16 (1929).

of stock in a corporation or of an equity share of potential earnings combined with the note.[15] Such an element demonstrated that the purported promissory transactions were either a fraud, a disguise for an actual sale of stock or a mere incident to a public offering or to a security transfer. But here, there is not a single sentence in the record which indicates that this was anything other than a simple personal loan transaction.

As applied here, the Blue Sky statute fell far below the due process benchmark of certainty.[16] On this ground, the Court should note probable jurisdiction.

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[15] See, e.g., *State* v. *Weger*, 25 Ohio L. Abs. 49 (1937), *appeal dis'm.*, 133 Ohio 23, 10 N.E. 2d 634 (1937); *State* v. *Stockman*, 21 Ohio App. 475, 153 N.E. 250 (1926); *People* v. *Aresen*, 91 Cal. App. 2d 26; 204 P. 2d 389, 393 (1949); *People* v. *Sidwell*, 27 Cal. 2d 121, 162 P. 2d 913, 914 (1945); *Llanos* v. *United States*, 206 F. 2d 852 (9th Cir. 1953); *United States* v. *Monjar*, 147 F. 2d 916 (3d Cir. 1944); *cf.*, *S.E.C.* v. *Vanco, Inc.*, 166 F. Supp. 422 (D.C.N.J. 1958).

[16] This is *not* to say that the statute is necessarily vague for failure to provide notice no matter what conduct the State might prove in another case. It is only its application in these circumstances which we charge is unconstitutional. This Court has recognized that a statute might provide sufficient notice for core violations, while its application to "certain marginal offenses" might result in the conviction being reversed because the statute, as applied, failed to provide sufficient notice. *United States* v. *National Dairy Corp.*, *supra* at 4. *Cf.*, *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-32 (1951); *United States* v. *Petrillo*, 332 U.S. 1, 6-8 (1947); *Robinson* v. *United States*, 324 U.S. 282, 285-286 (1945).

B. The Only Extrication for the Appellant From the Vague Proscription of the Statute Was Through His Assuming the Burden of Proving His Innocence. The Application of This Burden Here Was in Violation of the Due Process Clause.

In order to extricate himself from the toils of this indefinite prohibition, Appellant was unconstitutionally required to assume the burden of proof and prove his innocence. In addition, the trial court held that the delivery of a single promissory note was, by the operation of a statutory presumption, sufficient evidence to prove a "public offering" of promissory notes. The statute so construed violates the due process clause.

It is clear that the Ohio Blue Sky statute in its substantive terms—as is true of blue sky laws generally—does not extend to a "single," "isolated," or "private" sale where there is no "public offering" of securities. See Loss, *Blue Sky Law* 369-74 (1958 ed.); *cf.*, 1 Loss, *Securities Regulation* 653-65 (1961 ed.). Under the Ohio Law "commercial paper or promissory notes" which are "not offered directly or indirectly for sale to the public" are not within the substantive sweep of the statute. Ohio Rev. Code § 1707.02(G). And, a sale is exempt if "it is not made in the course of repeated and successive transactions of a similar character." Ohio Rev. Code § 1707.03(B). Thus, proof of a single transaction does not, *per se*, fall within the substantive criminal provisions of the Ohio act. Nevertheless, Appellant's conviction became possible because the trial court held that under the provisions of the Blue Sky Law, proof of the single Sestito promissory note: (i) created an evidentiary presumption sufficient to support a conviction that there was a "public offering" of promissory notes, and (ii) shifted the burden of persuasion (not merely the burden of going forward

with the evidence) to the defendant to prove that the single note was *not* part of a public offering—in short, that it shifted to Appellant the need to prove his innocence. On both counts, under the settled decisions of this Court, the statute, so applied, deprived Appellant of due process of law.

1. The Unlawful Substantive Presumption

On the record in this case, the trial court instructed the jury that the Blue Sky Law "creates a presumption that an instrument which is a security is not exempt" (Tr. Trans. 90). Proof of the single Sestito note alone raised the evidentiary presumption, sufficient to support a conviction, that Appellant Shott was unlawfully engaged in making a "public offering" of his promissory notes and that the note in evidence was part of such "public offering." And, once evidence of a single transaction had been introduced, then "certificates" from the Division of Securities (Tr. Trans. 11-16; App. E 8a-11a) that the note is in fact not registered nor is the maker licensed constitute "sufficient proof" beyond a reasonable doubt that Appellant had *unlawfully* failed to register the note and that he was acting as an unlicensed dealer *in violation of law* (Tr. Trans. 85). See Sections 1707.30 and 1707.45. Thus, by means of the statutory presumption, proof of innocent conduct is escalated into proof of guilty conduct.

We submit that, inasmuch as there is no rational connection in this present record between the proof and the presumption, use of the statutory presumption here to support the conviction violates due process of law.

The states are not free to create evidentiary presumptions at will. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *Ameri-*

can Sugar Ref. Co., 241 U.S. 79, 96 (1916). To insure against the use of unfair and improper presumptions in state criminal trials, the due process clause of the Fourteenth Amendment "set[s] limits upon the power of . . . a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicted." *Tot* v. *United States*, 319 U.S. 463, 467 (1943). Constitutionally, a statutory presumption cannot be sustained if:

> "there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.*, at 467-68.

This Court has repeatedly declared invalid presumptions created by state and federal criminal statutes where there was no rational connection in common experience between the facts proved and the ultimate facts presumed. *Manly* v. *Georgia*, 279 U.S. 1, 5-7 (1929); *McFarland* v. *American Sugar Ref. Co.*, *supra*; *Bailey* v. *Alabama*, 219 U.S. 219 (1911); *Tot* v. *United States*, *supra*. Where this Court has sustained statutory presumptions in criminal cases, it has generally been on the ground that common experience teaches that the conduct proved is so extraordinary that it indicates on its face a sinister or unlawful plan of action. *Casey* v. *United States*, 276 U.S. 413, 418 (1928) (possession of morphine); *Yee Hem* v. *United States*, 268 U.S. 178, 184 (possession of smoking opium); *Hawes* v. *Georgia*, 258 U.S. 1, 4 (1922) (possession of unlicensed still); *Adams* v. *New York*, 192 U.S. 585, 599 (1904) (possession of policy slips). *Cf.*, *Tot* v. *United States*, *supra*, 319 U.S. at 470-72.

However, in the instant case, the single Sestito loan transaction is itself neither unusual nor sinister, nor

will it support the statutory presumption. Thousands of identical loan transactions are made very day in the State of Ohio in the normal, and perfectly legitimate, course of business. Evidence of a single loan transaction simply cannot raise the inference that the debtor had thereby entered into a public offering of his promissory notes. Such an inference is directly contrary to common experience. The drawing of it here compounded the indefiniteness of the statute by requiring the defendant to adduce further proof of the innocence of conduct innocent on its face.

Because this statutory presumption, as applied here, is unreasonable and completely "beyond the realm of common experience," it was unlawful under the Fourteenth Amendment. *Manley* v. *Georgia; McFarland* v. *American Sugar Ref. Co.; Bailey* v. *Alabama, supra; cf., Kennedy* v. *Mendoza-Martinez,* Nos. 2 & 3 October Term, 1962 (February 18, 1963) (dissenting opinion of Mr. Justice Stewart, slip opinion p. 17). And because the substantive evidentiary presumption is unlawful, the record is devoid of any evidence whatsoever to support the conviction for a public offering of promissory notes. This being the case, the conviction violates the standards of due process set down in *Thompson* v. *Louisville,* 362 U.S. 199 (1960), and *Garner* v. *Louisiana,* 368 U.S. 157 (1961), and must be reversed.

2. The Statute Unlawfully Placed the Burden of Proof Upon Appellant, Not the State

The Ohio Blue Sky Law, as applied here, unlawfully placed the burden of proof upon Appellant in square violation of the constitutional principles of *Morrison* v. *California,* 291 U.S. 82 (1934); *Tot* v. *United States, supra;* and *Speiser* v. *Randall,* 357 U.S. 513 (1958).

The trial court stated that the "statutory provision makes it the duty or the burden of the Defendant to prove by a preponderance of the evidence that the instrument is exempt; that is, that it was not offered directly or indirectly for sale to the public" (Tr. Trans. 90). Thus, it fell to Appellant to disprove the very conduct which constituted the core of the Blue Sky violation—a public offering of promissory notes.

Unlike a consideration of a case involving only civil sanctions, *S.E.C.* v. *Ralston Purina*, 346 U.S. 119, 126 (1953), any criminal conviction which is obtained by placing upon a defendant the burden of proving his innocence must be, under the teaching of this Court, carefully scrutinized. As Mr. Justice Frankfurter has explained:

> "Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of he boasts of a free society—is a requirement and a safeguard of due process of law in the historic procedural content of 'due process.'" *Leland* v. *Oregon*, 343 U.S. 790, 801-803 (1952) (dissenting opinion).

The due process clause limits the states in any attempt to place the burden of proof upon a defendant in a criminal trial. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt." *Speiser* v. *Ran-*

dall, supra, 357 U.S. at 526. To be sure, in certain extraordinary circumstances, the burden of going forward with the evidence or even the burden of ultimate persuasion as to certain matters may be lifted by statute from the state in a criminal prosecution and cast upon a defendant. *Morrison* v. *California,* 291 U.S. 82 (1934). *Cf., Coffin* v. *United States,* 156 U.S. 432 (1895). But *Morrison* v. *California* marks strict constitutional limitations upon such a shift of the burden of proof:

> "The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." *Morrison* v. *California, supra,* 291 U.S. at 88.

Holding in the *Morrison* case that the state had *not* "proved enough to make it just" to shift to the defendant the burden of proof as the state statute required, this Court noted that the state's evidence consisted solely of proof of possession of agricultural land, "an act that carries with it not even a hint of criminality." *Id.,* at 90. However, to justify the transfer the burden of proof to the defendant, "experience must teach that the evidence held to be inculpatory has at least a sinister significance" or at least involves "a manifest disparity in convenience of proof. . . ."[17] *Id.,* at 91. *Cf., Tot* v. *United States,* 319 U.S. at 469-70.

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[17] After this Court's decision in *Tot* v. *United States, supra,* the comparative convenience of producing evidence appears no longer a self-sufficient basis for shifting the burden of proof to the defendant. 319 U.S. at 469-70.

Similarly, the state cannot by means of a statutory "exemption" unfairly impose upon the defendant the burden of proving that he falls within such exemption, especially where the denial of such an exemption is akin to a penalty for a crime. *Speiser* v. *Randall*, *supra*, 357 U.S. at 525-26.

Tested by these standards, the statutory transfer of the burden of proof to Appellant in the instant case violated the due process clause.[18] Within the terms of *Morrison*, the State has not "proved enough" of the Blue Sky violation to shift the burden of persuasion when it introduces nothing more than evidence of a single promissory transaction, especially where such a transaction on its face "carries with it not even a hint of criminality."[19] Here as in *Morrison*, the conduct which the State proved indicates "no such probability of wrong doing . . . [so] as to awaken a belief that [Appellant] is guilty if he fails to come forward with an explanation." 291 U.S. at 90. It is probable that the head of every family in Ohio has entered into numerous promissory transactions which under the interpretation of the trial court constitute "sales of securities." Clearly there is nothing "inculpatory" or "sinister" about such acts. Nevertheless, evidence of

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[18] This is *not* a case where the state was required to prove all the elements of a criminal violation and placed upon defendant merely the burden of proving a special defense, raised by separate pleadings and considered separately by the jury. *Leland* v. *Oregon*, 343 U.S. 790, 795-96, 799 (1952). Here, under the trial court's instructions, the Appellant had the burden of proof on the central issue of the substantive violation—whether the Sestito note was "offered to the public."

[19] *Cf.*, the facts of record in *Catterlin* v. *State*, 16 Ohio L. Abs. 410 (1934), *appeal dis'm.*, 128 Ohio 110, 190 N.E. 578 (1934), *appeal dis'm.*, 292 U.S. 614 (1934).

an everyday transaction, made innocently and in good faith, resulted in the burden of persuasion resting not upon the state to prove guilt, but upon the individual to prove innocence. This cannot comport with the standards of procedural due process set forth in *Morrison* v. *California* and *Speiser* v. *Randall*.

Accordingly, the indefiniteness of the statute as applied here not only violated due process in that it failed to give the Appellant notice of the forbidden conduct; it required him, once proof of the happening of an everyday transaction had been introduced, to exculpate himself from a charge which the facts submitted by the prosecution, under the vague contours of the statute, did not tend even to prove. This, too, was a violation of the due process clause.

II. THE PROSECUTOR'S CLOSING ARGUMENT DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

This Court has held that the state's failure to afford a defendant a fair hearing "violates even the minimal standards of due process." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The prosecutor, as the representative of a sovereign whose obligation is to govern impartially, has a duty to insure that a fair hearing is actually provided. *Berger* v. *United States*, 295 U.S. 78 (1935). When state prosecutors have been guilty of gross misconduct in trying a criminal defendant, this Court has not hesitated to grant relief. See *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948); *Mooney* v. *Holohan*, 294 U.S. 103, 112-13 (1935). *Cf., Adamson* v. *California*, 332 U.S. 46, 58 (1947); *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *Lisbena* v. *California*, 314 U.S. 219, 237 (1941).

The record demonstrates the unusual situation where the prosecutor, in his closing argument, has stepped beyond the basic standards of fair procedure and necessarily precluded a fair and reasoned consideration of the evidence by the jury. For this reason, the conviction should be reversed. First, in his closing statement, the prosecutor repeatedly attempted to introduce evidence of an extended series of similar loan transactions. See pp. 8-10, *supra*. This was clearly improper because the evidence in this record is limited to a single private loan transaction which the creditor-witness himself stated was the only loan transaction in which he and the Appellant were involved. Clearly, due process demands that an accused be convicted only by evidence in the record, *Thompson* v. *Louisville*, *supra*, and not by the prosecutor's constant charge that Appellant had entered into a series of promissory transactions.

Further, the prosecutor's repeated, startling attacks against Appellant for not taking the stand is a deprivation of due process in these circumstances where the State had proved nothing but innocent conduct and where a finding of guilt could be supported only by a technical statutory presumption and by the transfer of the burden of proof to the defendant. In such circumstances, the prosecutor's statements were clearly unfair. Here, the prosecutor demanded a conviction based not upon evidence in the record, but solely upon an inference of guilt because Appellant had refused to take the stand in his defense. *Cf. Adamson* v. *California*, 332 U.S. 46, 58 (1947). Thus, the prosecutor's conduct fell below the standards of due process. As this Court said in *Viereck* v. *United States*, 318 U.S. 236, 248 (1943):

> "He [the Prosecutor] may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Moreover, this conduct of the prosecutor underscored, and imposed more onerously upon Appellant, the constitutional faults of the statute, as applied here, that we have discussed under Point I. The prosecutor's remarks completed the snare in which the Appellant was caught by the indefiniteness of the statute and the imposition of the burden on the defendant to extricate himself from its toils.

CONCLUSION

In non-technical terms, the essential question in this case is whether a State can put a man in jail for uttering a single promissory note. We submit that it cannot where the terms of the penal statute are vague and indefinite, where the statute creates an unreasonable presumption of guilt, where the defendant must prove his innocence, and where he must bear the brunt of the prosecutor's improper and unfair closing argument. For these reasons, Appellant's conviction violated the due process clause of the Fourteenth

Amendment and probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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Appendix A—Judgment of Affirmance and Opinion of Ohio Court of Appeals

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. 9019.

STATE OF OHIO, *Plaintiff-Appellee*

v.

EDGAR I. SHOTT, *Defendant-Appellant*

JUDGMENT OF AFFIRMANCE

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Hamilton County, Ohio, and was argued by counsel, on consideration where of the Court find there is no error apparent on the record in said proceedings and judgment prejudicial to the appellant.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the appellee recover from the appellant, his costs herein expended taxed at $.....

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is further ordered that a special mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment. To all of which appellant, by his counsel, excepts.

[caption omitted]

OPINION—DEC. 11, 1961

APPEAL ON QUESTIONS OF LAW,
FROM COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO.

Messrs. C. Watson Hover, Hamilton County Prosecutor; Harry C. Schoettmer and Calvin W. Prem, for Plaintiff-Appellee,

Messrs. James G. Andrews, Jr., and John A. Lloyd, Jr., for Defendant-Appellant.

PER CURIAM.

An examination of the record discloses no error, prejudicial to the rights of Appellant. The judgment of the Court of Common Pleas, Hamilton County, Ohio is, therefore, affirmed.

LONG, P. J., and HILDEBRANT, J., Concur.

Appendix B—Judgment of Ohio Supreme Court

IN THE SUPREME COURT OF THE STATE OF OHIO

1962 Term To wit: Wednesday, June 27, 1962

THE STATE OF OHIO, }
CITY OF COLUMBUS. }

No. 37456

STATE OF OHIO, *Plaintiff-Appellee,*

v.

EDGAR I. SHOTT, JR., *Defendant-Appellant.*

Appeal from the Court of Appeals
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County was heard in the manner

prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff appellee recover from the defendant appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

* * * * * * * * * * *

THE SUPREME COURT OF THE STATE OF OHIO

No. 37456

[caption omitted]

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by .....

.....

Appendix C—The Statute Involved

Ohio Securities Act, Ohio Rev. Code, §§ 1707.01-1707.45:

"§ 1707.01 *Definitions.* (GC § 8624-2)

As used in sections 1707.01 to 1707.45, inclusive, of the Revised Code:

* * *

(B) 'Security' means any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or

credit of any person or of any public or governmental body, subdivision, or agency. It includes shares of stock, certificates for shares of stock, voting-trust certificates, warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidences of indebtedness, bonds, debentures, land-trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, certificates or written instruments in or under profit-sharing or participation agreements or in or under oil, gas, or mining leases, or certificates or written instruments of any interest in or under the same, receipts evidencing preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, certificates evidencing an interest in any trust or pretended trust, any investment contract, any instrument evidencing a promise or an agreement to pay money, warehouse receipts for intoxicating liquor and the currency of any government other than those of the United States and the Dominion of Canada but such sections shall not apply to bond investment companies or to the sale of real estate. 'Security' shall, for the purposes of such sections, be deemed to include real estate not situated in this state and any interest in real estate not situated in this state.

(C)(1) 'Sale' has the full meaning of 'sale' as applied by or accepted in courts of law or equity, and includes every disposition, or attempt to dispose, of a security or of an interest in a security. 'Sale' also includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

(2) 'Sell' means any act by which a sale is made.

* * *

(E)(1) 'Dealer,' except as otherwise provided in sections 1707.01 to 1707.45, inclusive, of the Revised Code, means

every person, other than a salesman who engages or professes to engage, in this state, for either all or part of his time, directly or indirectly, in the business of the sale of securities.

(2) 'Licensed dealer' means a dealer licensed under such sections. * * *

§ 1707.02 *Exempt securities.* (GC § 8624-3)

* * *

(G) Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public. * * *

§ 1707.14 *Dealer's license required; exceptions.*

(A) No person shall engage in this state in the business of acting as broker for others in the purchase or sale of securities unless such person is licensed as a dealer by the division of securities.

(B) No person shall sell securities within the state or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless such person is licensed as a dealer by the division, except in the following cases:

* * *

(2) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under division (G) or (I) of section 1707.02, or under section 1707.04, of the Revised Code, or if such issuer is not a dealer under section 1707.06 of the Revised Code; * * *

§ 1707.30 *Certificate of division as evidence.* (GC 8624-33)

In any prosecution, action, or proceeding based upon sections 1707.01 to 1707.45, inclusive, of the Revised Code, a certificate signed by the division of securities, showing the filing of or the failure to file any statement, description, or application required by such sections, shall constitute

prima-facie evidence of such filing or of such failure to file, and shall be admissible in evidence in any action at law or in equity to enforce sections 1707.01 to 1707.45, inclusive, of the Revised Code, or to prosecute violations of such sections.

§ 1707.44 *Violations.* (GC § 8624-25)

(A) No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L), inclusive, and (P) to (R), inclusive, of section 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code, or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities.

• • •

(C) No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description or qualified, and is not the subject matter of a transaction that has been registered by description; • • •

§ 1707.45 *Burden of proof.* (GC § 8624-25)

In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary

to negative the existence of facts which would bring a security within section 1707.02 or 1707.05 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04, or 1707.06 of the Revised Code or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. The burden of proof shall be upon the party claiming the benefits of any of such sections."

Appendix D—Indictment

THE STATE OF OHIO, HAMILTON COUNTY

THE COURT OF COMMON PLEAS OF HAMILTON COUNTY: Term of April in the year nineteen hundred and SIXTY ONE HAMILTON COUNTY, ss

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that

EDGAR I. SHOTT, JR.

on or about the TWENTY EIGHTH day of SEPTEMBER in the year nineteen hundred and SIXTY at the County of Hamilton and State of Ohio, aforesaid, did unlawfully sell, cause to be sold, offer for sale, or cause to be offered for sale, to PATRICK SESTITO, a security, to-wit, a written instrument evidencing a promise to pay money, which the said EDGAR I. SHOTT, JR., hereinbefore mentioned was not then and there licensed to sell securities in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45 inclusive, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that

on or about the TWENTY EIGHTH day of SEPTEMBER, in the year nineteen hundred and SIXTY, at the County of Hamilton and State of Ohio aforesaid, did knowingly, unlawfully and intentionally sell, cause to be sold, offer for sale or cause to be offered for sale to PATRICK SESTITO, a security, to-wit: A written instrument evidencing a promise to pay money, which security was not then and there registered by description nor then and there registered by qualification in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45, inclusive, and which security and transaction was not then and there registered or exempted by Ohio law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ C. WATSON HOVER
Prosecuting Attorney
Hamilton County, Ohio

Appendix E—Transcript of Evidence

William J. Reidenbach,

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prem [The prosecutor]:

Q. Will you state your name and address to this jury, please? A. William J. Reidenbach, 876 Poling Drive, Columbus, Ohio.

Q. And for the purpose of the record, will you spell your last name? A. (Spelling) R-E-I-D-E-N-B-A-C-H.

Q. Now, Mr. Reidenbach, you are an attorney-at-law? A. I am.

Q. And by whom are you employed? A. The State of Ohio, Department of Commerce, Division of Securities.

Q. In what capacity do you work for the Division of Securities? A. Attorney Examiner.

Q. And in connection with your duties, Mr. Reidenbach, let me ask you if you had an occasion to examine the records of the Division of Securities to ascertain whether Edgar I. Shott, Jr., the Defendant in this case, was licensed by the Division of Securities of this state as a broker on or about the 28th day of September, 1960? A. Yes, I did make such an examination.

Q. Was he licensed on that date? A. No.

Q. Has he ever been licensed by the Division of Securities of this state? A. No.

Mr. Prem: May I have these marked for identification.

(Thereupon the documents above referred to were marked for identification State's Exhibits Nos. 1, 2 and 3, respectively.)

Q. Now, Mr. Reidenbach, I would like to show you a paper we have marked for identification as Exhibit No. 1. Let me ask you if you had an occasion to examine the records of the Division of Securities of this state with reference to that piece of paper to ascertain whether that piece of paper, that instrument had ever been registered with your department? A. Yes, I have made such an examination.

Q. And has that instrument been registered with your department? A. No, it has not.

Q. Or I should say, was it so registered on the 28th day of September, 1960? A. No.

Q. Does your department have any record of any instrument issued by the Defendant, Edgar I. Shott, ever having been registered with your department? A. No.

Q. Mr. Reidenbach, in connection with your duties as an Attorney Examiner, I would like to now ask if, in compliance with Section 1707.30 of the Revised Code, your department prepared a certificate stating that Edgar I. Shott has not been licensed by the State of Ohio? A. Yes.

Q. And did you also have prepared or bring with you a certificate showing that the instrument I just showed you was not registered? A. Yes.

Mr. Lloyd: If your Honor, please, for the purpose of saving time, we will agree to stipulate all of this.

Mr. Prem: I am through it now, Judge.

Q. I would like to show you State's Exhibit Nos. 2 and 3 marked for identification, and with reference to No. 2, first, will you tell the jury what that is? A. Exhibit 2 is a certificate of the Division of Securities, which certifies that the records of the Division disclose that Edgar I. Shott, Jr., has, at no time, been issued a Security Dealer's or Security Salesman's license.

Q. And by whom is that certificate signed? A. By the Chief of the Division.

Q. What is his name? A. W. Patrick Green.

Q. Now, I would like to have you look at No. 3 for identification. Tell the jury what that is. A. Exhibit 3 is a certificate of the Division, which certifies that the records of the Division show that none of the instruments issued by Edgar I. Shott, Jr. have been registered with the Division of Securities.

Mr. Prem: Your Honor, at this time the State would like to offer into evidence as exhibits, those that have been marked Nos. 2 and 3 for identification.

Mr. Lloyd: Now, I am going to object to that, your Honor. I am going to tell you why. I would like to be heard.

The Court: Objection overruled. I think I know why. Nos. 2 and 3 will be admitted.

(The documents heretofore marked for identification State's Exhibit Nos. 2 and 3, were received in evidence.)

Mr. Prem: You may cross examine.

Cross Examination

By Mr. Lloyd [defense counsel]:

Mr. Lloyd: Will you please mark these for identification.

(Thereupon the documents above referred to were marked for identification Defendant's Exhibit Nos. 4 and 5, respectively.)

Q. (By Mr. Lloyd) Now, Mr. Reidenbach, I hand you a writing marked as the Defendant's Exhibit 4. Will you identify that for me, please, if you can? A. Exhibit 4 is a form used by the Division of Securities.

Q. Now, sir, I hand you a document denominated Defendant's Exhibit 5. Will you identify that for me, if you can? A. Exhibit 5 is also a form used by the Division of Securities.

Q. Can you tell us, Mr. Reidenbach, for which purpose this document known as Defendant's Exhibit 5 is used? A. Exhibit 5 is a form called Form 6—

Q. Excuse me, sir, that is wrong. I did not intend to hand you that. It is my mistake. I intended to hand you this other Exhibit 4. A. Exhibit 4 is a form called Form 9, which is used by persons making an application to the Division to register certain securities.

Mr. Lloyd: Your Honor, we have no further cross examination of this witness.

Mr. Prem: We have no further questions.

(Witness excused.)

The Court: Are you finished? There will be no further examination of Mr. Reidenbach?

Mr. Prem: That is just what we were talking about, Judge. At this time we can't state whether we will need that witness again.

The Court: All right, then he had better leave the Court Room.

Mr. Prem: Patrick Sestito.

Patrick Sestito.

being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Prem:

Q. Mr. Sestito, will you state your full name to this Court and jury? A. Patrick Sestito.

Q. And how do you spell your last name? A. (Spelling) S-E-S-T-I-T-O.

Q. Where do you live? A. 5605 Abbottsford.

Q. Is that here in Cincinnati, Ohio? A. Yes, sir.

Q. Cincinnati 13, I believe? A. Yes, sir.

Q. What is your business or your occupation, Mr. Sestito? A. Salesman, furniture.

Q. And where do you work? A. Fox Furniture Company.

Q. How long have you been employed as a salesman, furniture salesman? A. For which outfit, sir?

Q. How long have you been engaged in that business? A. Oh, about six years.

Q. I would like to ask you if you are acquainted with the Defendant in this case, Edgar I. Shott, Jr.? A. Yes, sir.

Q. Let me ask you if you had an occasion to see Mr. Shott on or about the 28th day of September, 1960? A. Yes, sir, I did.

Q. What was the occasion for your seeing him on that day? A. Well, I went there just to make a regular visit, and of course, naturally he approached me on this, you know, lending money, and of course, naturally I loaned him some money.

Q. Well, now he was—where was it you saw him on that day? A. At his office.

Q. Where is his office located? A. Atlas Bank Building, second floor.

Q. That is here in Cincinnati, Hamilton County, Ohio? A. Yes, sir.

Q. And what time of the day was it that you went there, if you recall? A. Well, I would say it was about 1:30, somewhere in the afternoon.

Q. In the afternoon? A. Yes, sir.

Q. When had you been there prior to that date? A. Well, I mean—well, I know Mr. Shott. I stopped in several times. I mean I just couldn't say.

Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960? A. No, sir, not that I can remember.

Q. Had you telephoned to Ed? A. No, sir.

Q. Or made any contact with him? A. No, sir, I just dropped in.

Q. When you dropped in, was there any purpose for your dropping in on that date? A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him.

Q. Did you have any money with you? A. Yes, sir, I had about—little over $2,000.00 with me.

Q. Now, let me ask you, Mr. Sestito, if on that date you had any conversation with Mr. Shott about the Shott Investment Company? A. Yes, sir, we did.

Q. And what was the conversation you had? A. Well, I mean of course, he approached me on this investment, and he told me—he asked me if I wanted to make some money. Of course, naturally everybody wants to make money. And so I asked him a few questions about it and, of course, he told me that this money was being invested on financing buildings, and so forth.

Q. Well, had you heard or did you have any knowledge about this Shott Investment Company before you went there on that day? A. Well, sir, I mean I have heard around. I mean, you know, there was such an investment going around.

Q. And what was it that Mr. Shott told you about the company and the investments that were being made? A. Well, I mean, of course, naturally, I asked him if I could

check it out and, of course, knowing Mr. Shott I figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing it in buildings and financing. I know finance companies make a lot of money. I do know that.

Q. Did he say who was investing it in buildings and financing and making a lot of money? A. No, sir, he didn't state that.

Q. Was there any conversation had with you at that time about your participating in those investments? A. Sir, I didn't understand that.

Q. Did he ask you for any money? A. Yes, he did.

Q. Did he ask you for any particular amount? A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good? A. Well, the percentage, twelve and a half per cent.

Q. What were the arrangements that were to be made? A. Twelve and a half percent for 60 days.

Q. Let me ask you if, in the course of your conversations about the Shott Investment Company, that you had with Mr. Shott on that day in his office, he showed you anything about the company? A. Well, yes, he showed me, oh, I don't know what you would call it. An eight and a half by eleven stationery, plaque more or less, showing about these Shott investments.

Q. What do you mean showing about the Shott investments? A. Of course, I couldn't read it. I couldn't remember it. It told about the company, Shott's investments.

Q. Did it have writing or figures or what did it contain? A. Well, it just stated, you know, like—told about the company, like it's been in effect since—of course, I couldn't remember the date. I think it said something like 1955.

Q. Did it say anything about the investments that were being made? A. Well, sir, I can't remember that. I just glanced at it and didn't study it too much.

Q. After you read that, did Mr. Shott make any other explanations to you about how the company operated or what was happening to the money? A. No. Of course, he specified to report it to the—of course, I asked him—of course, I figured it was legitimate because I mean he being a lawyer, it was straight up and down. And he says report it to the income tax. And, of course, naturally when he said that I figured it was all right.

Q. Report what to the income tax? A. The profit.

Q. Did you invest any money on that day? A. Yes, sir, $2,000.00.

Q. And how did that transaction take place? A. Well, I received a note for the money. I believe it is right here.

Q. I mean did you give him that money at that time? A. Yes, sir, I did.

Q. Was that part of the money you had in your pocket? A. Yes, sir.

Q. Was that the reason you went to that office? A. Well, I mean not necessarily. It was just more or less, you know, just a social call, just to stop in and say hello.

Q. And you had that money in your pocket at the time? A. Yes, sir, I did.

Q. Now, how did you pay him the $2,000.00? A. Well, I had a check from Irvin's Furniture, which was a large, I would say about $1,200.00, and the rest was in cash.

Q. You gave him $2,000.00, including that $1,200.00 check? A. No, sir, the $1,200.00 check and the balance of $800.00, which made a total of $2,000.00.

Q. And the piece of paper that you received back from Mr. Shott, what amount was stated, if any, on it? A. If I remember correctly, it was $2,250.00.

Q. Now, the $250.00 above the $2,000.00 stated on that piece of paper, what did that represent? A. Twelve and a half per cent profit.

Q. For the money that you had placed with him? A. Yes, sir.

Q. I would like to show you a piece of paper we have marked with the No. 1 for identification, Mr. Sestito. You

examine that. Have you ever seen it before? A. Yes, sir; that's the note that he gave me.

Q. And was that the note that he gave you on September the 28th, 1960, at his office in the Atlas Bank Building of this county? A. Yes, sir.

Q. Was that the piece of paper that you received after you paid him $2,000.00? A. Yes, sir, it is.

Q. Did you see Mr. Shott or come into contact with Mr. Shott again after that date? A. Well, I mean I was over in Covington about two months ago. I was just cruising by. I signaled at him but nothing else.

Q. Let me withdraw that question and restate it. I perhaps asked you in a clumsy fashion. When was the $2,250.00 to be paid to you as you understood the transaction? A. Well, 62 days later.

Q. Well, what date? A. Well, to be truthful with you, I couldn't remember the date. I think it was the last of November, though, somewhere in there.

Q. The last of November. And this piece of paper that was given to you that we have referred to as Exhibit No. 1 for identification, who was that signed by, or how was that signed? A. Well, to tell you the truth, I don't know. I believe it is Mr. Shott's writing.

Q. Well, I mean was it given to you by Mr. Shott? A. Yes, it was.

Q. And what did it say on there? A. Shott Investment Company and his name below it.

Q. And did it indicate a date that it was due? A. Yes, due November the 29th, 1960.

Q. Now, between September the 28th, 1960 and November the 29th, 1960, did you come into contact with Mr. Shott? A. Yes. When it was due, I mean his secretary called me and asked me if I wanted to parlay it or—

Q. Wanted to what? A. Wanted to, you know, to parlay it.

Q. What do you mean parlay it? A. Well, to let it ride, or, you know, or draw the profit out. Of course, I told her I wanted to, you know, draw it out.

Q. She asked you if you wanted to let it ride? A. Yes, sir.

Q. What did you understand that to mean? A. Well, I mean to invest it all over again.

Q. Reinvest it? A. Yes, sir.

Q. Did you reinvest it? A. No, I didn't.

Q. What did you do? A. I withdrew my money.

Q. Well, did you go there to the office? A. Yes, sir, I went there to the office and I received a check.

Q. How many checks did you received? A. One check for the full amount.

Q. $2,250.00? A. Yes, sir.

Mr. Prem: Your Honor, at this time I would like to offer into evidence Exhibit No. 1.

Mr. Lloyd: No objection.

(The document heretofore marked for identification State's Exhibit No. 1, was received in evidence.)

Mr. Prem: You may cross examine.

Cross Examination

By Mr. Andrews:

Q. Let me ask you, you used some colorful language on the stand here. Now, you testified you are a furniture salesman, right? A. Right.

Q. And you normally refer to that as hustling sticks, don't you? A. Well, yes, that's right.

Q. And I want you to be a little bit more careful now on, if you will, Pat, and use the language —

The Court: Objection sustained.

Mr. Schoettmer: I don't think we need this kind of comment.

The Court: No, you don't have to instruct the witness.

Q. Pat, how long have you known Ed Shott? A. Well, I would say since about 1953, I would say.

Q. And in the ensuing years he has represented you a couple of times, one time when you got sick after eating something, and he represented you on that. Later on you

had one of your employers go bankrupt and he handled that for your employer; is that right? A. Yes, he did.

Q. And periodically you stopped in the office and talked to Ed, and if Ed was not there, you would talk to me, right? A. Yes.

Q. This has gone on over a long period of years, right? A. Right.

Q. Now, going back to September of 1960, when this transaction took place in the office, your testified on direct that you had heard about investment opportunities or something of that nature; is that right? A. Yes, I did.

Q. Involving Leslie Stickler? A. Well, no. I mean I didn't know about that at that time. I didn't know about that.

Q. Where did you hear it and who did you hear it from? A. Well, I heard it, well car dealers. A couple of places mentioned, you know, about this.

Q. Where? A. Reading Road in particular. I believe this State Motors, somebody at State Motors. But, of course, he may not have known what he was talking about, but I did hear it.

Q. You knew Ed over this long period of time and you talked to Ed quite a few times during the period of a month or a period of six months, right? A. Oh, yes.

Q. And isn't it a fact that Ed was the one who told you that he was loaning money to Les Stickler? A. No, he didn't say who he was loaning it to. No, I don't remember that.

Q. How did you find out he was loaning it to Les Stickler then? A. Well, I read that in the newspapers. I mean I really don't know.

Q. You found out from the newspapers? A. Yes. I mean when it was all—when the whole thing was up.

Q. Are you telling, do you want this jury to believe the first time you knew Ed Shott was loaning money to Stickler was when you read it in the newspapers? A. That's right.

Q. How did you happen to loan money directly to Stickler? A. A fellow by the name—

Mr. Schoettmer: Objection. We are not concerned with that here.

Mr. Andrews: This goes to his credibility.

Mr. Schoettmer: I will withdraw it.

A. Well, a fellow that worked up there at the furniture company, I don't know how he knew him, but he did know about it. His name was Eddie Mitchell, and of course, he mentioned the fact that Stickler investment was giving, you know, a much higher rate. So that is how come I went there.

Q. But, let me ask you something. Fifteen or 20 minutes ago, when we were out in the hall, didn't you tell me that you had nothing against Ed Shott, except it was through him you heard about Stickler, and through him you loaned to Stickler, and when you loaned to Stickler, you lost your money?

Mr. Schoettmer: I object.

The Court: Objection sustained. You can't impeach your own witness.

Mr. Andrews: He is not my own witness, if the Court please. I am impeaching him.

Mr. Schoettmer: We are not concerned about his personal feelings about Ed Shott, your Honor, regardless of what he told the counsel. We are after the truth what happened in this transaction.

The Court: That is all we want to know.

Q. Didn't you tell me that out in the hall about 20 minutes ago, Pat? A. Well, actually—

Q. Just yes or no; did you tell me or didn't you? A. Yes.

Q. Actually, when you went into Mr. Shott's office on the 28th of September, Mr. Shott told you that he would like to borrow some money from you, didn't he? A. That's right.

Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time? A. That's right.

Q. And you trusted Ed Shott? A. That's right.

Q. You trusted his ability to pay it back to you? A. Yes, sir, I did.

Q. And between the two of you, you agreed to lump the principal and this twelve and a half per cent interest and show it on the face of the note as a loan of $2,250.00? A. Right.

Q. And it was not your intention to charge, you didn't expect to receive any interest in addition to the $250.00 which was included in the principal amount in the face amount of the note, did you? A. No, I didn't.

Q. And it was after that agreement was made between you and Ed that the loan agreement was then reduced to writing in the form of this note that is in evidence; is that right? A. Right.

Q. He called out to his secretary and said, "Mr. Sestito and I"—"I am borrowing so much money, so make up a note for Mr. Sestito," right? A. Right.

Q. He didn't sell you anything, did he? A. Well, no.

Mr. Schoettmer: Counsel hasn't been sworn, has he, your Honor? He has been doing the testifying. I object to all this.

Mr. Andrews: I am leading the witness, your Honor.

The Court: As to the last part, whether he sold him anything. You did deliver—he did deliver this instrument to you, didn't he?

The Witness: Well, I got the note, yes.

The Court: He delivered that to you, didn't he?

The Witness: I got it there that date.

Q. Who gave it to you, Ed or his secretary. A. Well, to be truthful, I don't remember. I believe, I will swear I don't know. There was a lot of people up there and there was a lot of confusion. I believe that he signed it. I believe he did.

Q. You aren't sure whether he signed it? A. Really, I am not.

Q. As a matter of fact, Pat, you knew Ed all these years and you knew if you loaned him money he would pay it back to you, isn't that right? A. Yes, I trusted him.

Q. You didn't pay any attention to how it was signed or anything else? A. That's right.

Q. And when it was due, what happened, you got it back? A. That's right.

Q. With interest? A. Right.

Q. The paper that you saw, you testified to on direct examination, you said you thought that indicated Shott Investment, this partnership had been in existence since 1955; as a matter of fact, that didn't come into existence until January, 1960, isn't that correct?

Mr. Schoettmer: He doesn't know. Counsel is testifying again.

The Court: Objection sustained. When there is an objection, wait until the Court rules.

Q. Do you know the Shott Investment, this partnership, when it was created? A. No, I really don't. That was more or less a guess.

Mr. Lloyd: Your Honor, this involves a point. We would like to have a second to confer.

Mr. Andrews: If the Court please, we will not ask this witness any more questions on cross examination at this time, with the understanding we would like to have permission to recall him on cross examination at some later time.

Mr. Schoettmer: There is no objection.

The Court: All right.

Mr. Prem: I would like to ask one or two additional questions on redirect examination.

Redirect Examination

By Mr. Prem:

Q. Mr. Sestito, had you made any similar, any loan transactions with Mr. Shott like the one you just described to the jury prior to that date? A. No, sir.

Q. Or since that date? A. No, sir.

Q. And the $2,000.00, or little more, that you had with you the day you went down to Mr. Shott's office, where

did you get that money? A. Well, part of it was commission from Irvin's Furniture and the other, you know, I accumulated. I mean I carry that much money in my pocket.

Q. Did you get it from any loan company? A. No, not at that time. But later on, when I invested with Stickler, I did. No loan company.

Mr. Prem: That is all. We have no additional questions.

The Court: All right.

(Witness excused.)

The Court: You say you may want to recall this witness?

Mr. Andrews: We may want to recall him later on, Judge. That is by agreement with the State.

The Court: I don't want to keep the witness sitting around longer than necessary.

Mr. Andrews: Not today. We will take care of notifying him to come back.

The Court: All right.

Mr. Schoettmer: The State rests.

The Court: The State rests.

. . . . . .

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No. 877

In the

Supreme Court of the United States

October Term, 1962

EDGAR I. SHOTT, JR.,
Appellant,

vs.

STATE OF OHIO,
Appellee

On Appeal from the Supreme Court of the State of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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On Appeal from the Supreme Court of the State of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

Now comes the State of Ohio, Appellee, by Raymond E. Shannon, Prosecuting Attorney of Hamilton County, Ohio, Harry C. Schoettmer and Calvin W. Prem, Assistant Prosecuting Attorneys, of Hamilton County, Ohio, and respectfully move this Court for an Order dismissing the Appeal for the reason that there have been no denials of Appellant's federal Constitutional rights in the proceedings below.

JURISDICTIONAL STATEMENT

The appeal of Appellant, Edgar I. Shott, Jr., from the judgment of the Supreme Court of the State of Ohio

presents the question whether the Appellant's conviction for violating the Ohio Securities Act, Sections 1707.44 paragraph (A) and 1707.44 paragraph (C), Revised Code of Ohio, was consistent with the principles of due process as is guaranteed in the Fourteenth Amendment to the Constitution.

OPINIONS BELOW

The brief of the Appellant correctly cites the opinions and judgments below.

THE STATUTE INVOLVED

The statute involved is the Ohio Securities Act, Section 1707.01 through 1707.45, Revised Code of Ohio, and particularly Sections 1707.01 (B), (C-1), (C-2), (E-1) and (E-2); 1707.02 and 1707.03; 1707.14 (A) and (B-2); 1707.29 and 1707.30; 1707.44 (A) and (C-1); and 1707.45.

QUESTIONS PRESENTED

The questions presented by Appellant, on this appeal are:

I. Whether the application of the Ohio Securities Act to the Appellant, in his indictment, trial and conviction, violated the Due Process clause of the Fourteenth Amendment to the Constitution because:

(a) the statute is so vague and indefinite that it failed to provide notice to Appellant that his acts were unlawful, and

(b) the statute improperly and unconstitutionally placed the burden of proof upon the Appellant to overcome a statutory presumption.

STATEMENT OF THE CASE

1. INTRODUCTION

Appellant was tried and convicted by a jury in the Common Pleas Court, Hamilton County, Ohio, of violating Sections 1707.44 paragraph (A), and 1707.44 paragraph (C), Revised Code of Ohio, which sections are a part of the Ohio Securities Act. In essence, the charges were that Appellant (1) sold a security without being licensed, and (2) knowingly sold a security which was not registered, both as required by law.

Although the trial extended over a period of three days, the actual activity in the court room was limited. On the first day, the jury was impaneled and sworn, opening statements were made and the State (Appellee) presented its case. The Court adjourned until the following morning. On that date the Defense (Appellant) advised the Court that it also rested with no presentation of testimony. Court was, thereupon, adjourned until the third morning, at which time arguments were made by counsel and the jury was charged by the Court. In less than one hour of deliberation, the jury returned its guilty verdicts.

2. THE FACTS

On the first day of the trial, after the jury was impaneled and sworn, counsel for Appellant, in his opening statement, made certain admissions and stipulations on behalf of Appellant. Counsel stipulated that Appellant did not have a license to sell securities and that Appellant had never registered a security with the Division of Securities of the State of Ohio (T-7); that the paper writing, constituted a promissory note (T-8); that Sestito handed the sum of two thousand ($2000.00) Dollars to Appellant, and

Appellant gave the note to Sestito; that the note was signed "Shott Investment Company by Edgar I. Shott, Jr." (T-9); that the Shott Investment Company was a partnership comprised of Appellant and members of his family (T-9); that the Shott Investment Company was formed by the Appellant to reduce his income tax payments (T-9); and counsel further stipulated that the Appellant was lending the money to one, Leslie D. Stickler, who was borrowing it regularly from him for the purpose of enabling Stickler to make short term, high interest loans to contractors (T-9).

In view of the statements and stipulations made by Appellant's counsel, Appellee called two witnesses to testify, (1) an Attorney Examiner for the Ohio Division of Securities, and (2) Patrick Sestito, the recipient of the promissory note.

The Attorney Examiner, although it was already stated and stipulated by Appellant's counsel, testified that Appellant was not licensed as a dealer in securities, and that the promissory note was not registered with the Ohio Division of Securities. It is interesting to note that Appellant (Brief, page 5) suggests that this witness "testified to the conceded facts."

Patrick Sestito, a resident of Cincinnati, Ohio, testified that he, in the latter part of the summer of 1960, heard about investment opportunities with the Appellant from certain car dealers on Reading Road (T-27). On September 28, 1960, Sestito had two thousand ($2000.00) dollars in his pocket and went to Appellant's law office. He had not been in previous contact with Appellant, nor had he been contacted by Appellant in any manner. Sestito and Appellant had a discussion about the investing of Sestito's money in buildings and financing (T-18, 19). At that time Appellant explained the workings of the Shott Investment Company and showed Sestito a draft of the progress and

development of the Shott Investment Company. Although intending only to invest one thousand ($1000.00) dollars, Sestito delivered over two thousand ($2000.00) dollars to Appellant because "it sounded so good." (T-20) Sestito was satisfied with the 12½ per cent profit for 60 days, which Appellant offered him. Upon payment to him of the money, Appellant presented Sestito with a promissory note (T-21). The note stated that Appellant would pay Patrick Sestito the sum of two thousand two hundred and fifty ($2250.00) dollars on November 29, 1960. The two hundred and fifty ($250.00) dollars, above the amount actually invested by Sestito represented 12½ per cent profit (T-22). On the due date, Appellant's secretary telephoned Sestito and asked him if he wanted "to parlay it . . . let the note ride" or, in other words, to reinvest it. (T-24) Sestito decided against reinvestment with the Shott Investment Company, went to Appellant's office and received a check of Appellant in full payment of the amount of the promissory note. (T-25).

ARGUMENT

Appellant contends that the record demonstrates a denial to him of the constitutional guarantees of due process because (1) the statute involved is vague and indefinite, (2) the statute created an unlawful substantive presumption, and (3) the prosecutor's closing argument was unlawful and unfair. These same three contentions have been raised by Appellant in each of the reviews he has taken through the Ohio courts, and similar supporting arguments were submitted.

1. THE STATUTE IS NEITHER VAGUE NOR INDEFINITE AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellant contends that the statute failed to provide him with notice of the illegality of his acts.

A. History of the Act

The Securities Law of Ohio, which is popularly known as the "Blue Sky Law," has been in existence for more than forty (40) years. Similar statutes, in sister states, have paralleled the life of the Ohio law. Many charges have been brought in the several states, and the Courts have been repeatedly called upon to examine and construe the meaning and affect of the Securities Law. The Ohio law, in particular, was held valid by the Supreme Court of the United States in the case of *Hall* v. *Geiger-Jones Company*, 242 U.S. 539, 61 L. ed. 480. At this late date, Appellant is hard put to say that the Ohio Securities Law is vague, ambiguous and indefinite.

B. Purpose of the Act.

From an intelligent reading of the Ohio Securities Act, its purpose is quite apparent. It is designed and intended (1) to regulate the sale of securities, and (2) to prevent and guard against fraudulent schemes calculated to entrap the ignorant, gullible and unwary.

The preventive part of the law must, of necessity, fit hand-in-glove with the regulative part. In the case of *Hall* v. *Geiger-Jones Company*, at page 550, the United States Supreme Court held that the purpose of the act is:

> "... to protect the public against the imposition of unsubstantial schemes and the securities based upon

them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties, or other repressive measures."

and again at page 551, the Supreme Court said:

"Its purpose is, as we have seen, to give a basis for judgment of securities offered the purchasing public; a sure credit where it is deserved and confidence to investment and trading; prevent deception and save credulity and ignorance from imposition."

The Supreme Court, in the case of *Hall* v. *Geiger-Jones Company*, at page 554, in reply to the argument that all people should be free to act foolishly if they wish, said:

"We are not disposed to give serious attention to the contention that while the statute in form prohibits sales it at the same time necessarily prohibits purchases, and thereby shields the contemplated purchasers from the loss of property by their own defective judgment, and puts them as well as the sellers under guardianship. If we may suppose that such purchasers would assert a liberty to form defective judgments and resent means of information as a limitation to their freedom, we must wait until they themselves appear to do so. Besides, there are examples in legislation of unsolicited protection, and there is much in the business we are considering which urges to an imitation of the examples. It is not wise to put out of view the tendencies of the business, and that it tempts to and facilitates speculative judgments, if the purpose be trading; improvident judgments if the purpose be investment. . . . it must be judged upon that consideration, not upon the assertion of an absolute liberty which does not exist."

The Securities Law in Ohio literally blankets all of the transactions that are concerned with the exchange of securities created in the economic business within the state.

In the passage of these statutes, it is apparent that the State of Ohio has developed a paternalistic attitude toward the citizens who participate in investments in the state.

C. The Statutes.

Section 1707.01, Revised Code of Ohio, defines the various words and terms used in the Act. This section is clear, concise and conclusive. Without a tortured construction of the words, it spells out the full meaning and impact of the Securities law.

Sections 1707.02 and 1707.03, Revised Code of Ohio. After having examined the economic business of the state, and in order to allow an orderly flow of the sale of securities, the Legislature of Ohio, in this (1707.02) statute, designated certain securities as exempt from the requirement of registration. And in Section 1707.03, the Legislature exempted certain transactions from the requirement of registration. In each exemption set forth, the Legislature has carefully selected those instances where it appears that the citizens of the state do not need the protection of the law. The person who deals in securities, and who desires to comply with the law, can, without difficulty, ascertain that he, and all securities are subject to the registration requirements of the law unless one of the exemptions set forth applies to his particular position. We submit that this simple operation can not, by any twist of the words, be deemed vague, ambiguous or indefinite.

In the implementation of its exclusive control over transactions in securities, the Legislature has placed certain duties upon the Division of Securities. This agency has

filled the paternal roll of protector of the citizens of Ohio and examiner of specific securities, transactions, salesmen and dealers. Into its hands the Legislature has placed the responsibility to determine the safeguards necessary to maintain the proper economic standards of securities issued and sold within the State.

Every citizen engaging in securities and securities transactions is charged with the responsibility of knowing the position of the Division of Securities in relation to a security. To further emphasize the responsibility of each citizen, the Legislature created and enacted Sections 1707.29 and 1707.30, Revised Code of Ohio.

Section 1707.29, Revised Code of Ohio is as follows:

> "In any prosecution brought under sections 1707.01 to 1707.45, inclusive, of the Revised Code, the accused shall be deemed to have had knowledge of any matter of fact, wherein the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge."

Section 1707.30, Revised Code of Ohio is as follows:

> "In any prosecution action or proceeding based upon sections 1707.01 to 1707.45, inclusive, of the Revised Code, a certificate signed by the division of securities, showing the filing of or the failure to file any statement, description or application required by such sections, shall constitute prima facie evidence of such filing or of such failure to file, and shall be admissible in evidence in any action at law or in equity to enforce sections 1707.01 to 1707.45, inclusive, of the Revised Code, or to prosecute violations of such section."

The Appellee has no quarrel with many of the cases cited by the Appellant pertaining to due process of law.

vagueness of statutory language, and so forth. It is submitted that, in and of themselves, these cases reflect the law on the particular issues of fact involved therein, but, it is maintained, that none of them are applicable to the facts of the instant case.

We have found it necessary to approach the securities law from a fundamental concept because of the Appellant's claim that the statute is void and unconstitutional by reason of being vague, ambiguous and indefinite. The devious twistings and turnings of the Appellant, in his actions and words, in an apparent attempt to complicate a simple operation, indicate his intention to evade the law, the Division of Securities and the judgment rendered.

The definitions set forth in *Section 1707.01* are inclusive of all transactions in securities in keeping with the paternal concept of the State. The Appellant seeks a loophole to escape judgment by attempting to create an illusion of confusion. He has taken words out of context and has applied tortured definitions and unreasonable inferences in order to give color to his creation.

"Knowingly and intentionally," as used in Section 1707.44 (C), can only mean that the Appellant, at the time that the transaction was made, was aware of the act he was performing, and that he did the act voluntarily. Any other interpretation must necessarily be strained.

It is argued, by the Appellant, that the facts involved in the instant case, as established at the trial, disclosed "only one transaction"; and that he, therefore, was not "alerted" to the consequences of his single deed; and that the Appellant could not be a "dealer" by reason of this one sale.

Section 1707.01 (B) (C-1) (C-2) defines "security," "sale" and "sell." A promissory note is a security. The indictment, setting forth the charges against the Appellant, accuses him of having unlawfully sold, caused to be sold,

offered for sale, or cause to be offered for sale, a security, to-wit, a written instrument evidencing a promise to pay money, while Appellant was not licensed to sell securities and, likewise, with selling an unregistered security.

A simple statement of the law, as can be determined from an intelligent reading reading of the statutes involved, is that dealers or sellers of securities must first be licensed, and the securities sold must be registered unless the security and/or sale qualifies under the exemptions enumerated in *Sections 1707.02 and 1707.03*.

Section 1707.45, Revised Code of Ohio, provides as follows:

> "In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary to negative the existence of facts which would bring a security within section 1707.02 or 1707.05 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04 or 1707.06 of the Revised Code or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. The burden of proof shall be upon the party claiming the benefits of any such sections."

It is claimed by the Appellant that the language of these statutes is so vague, ambiguous and indefinite that he was unable to determine which acts and conduct were prohibited; what was required of him by the law. It is respectfully submitted that there is absolutely no basis for such claim; that the language used in those statutes is such that men of common intelligence can, without difficulty or conjecture, know and understand the meaning. And, as the Appellant has pointed out in his brief, he is not only a man of common intelligence, but he is an attorney.

There has been no abstract evaluation, no strained reasoning, involved here.

It is submitted that a man of common intelligence, who had bothered to read the statutes before engaging in the "Shott Investment Company" business, as described in the record of this case, would have immediately discovered that promissory notes are securities; that securities require registration, unless exempted; that dealers or sellers must be licensed, unless the transaction is exempted. He would have further discovered that the burden of qualifying under the exceptions becomes his obligation. This he would have discovered from the ordinary, clear and concise language used, and without speculation or conjecture. There being no vague, ambiguous or indefinite language, Appellant's contention that his fundamental right of due process was violated, fails. The Appellant's contention that the Ohio Securities Act falls below the due process benchmark of certainty is unsupported.

2. THE STATUTE DOES NOT CREATE AN UNLAWFUL SUBSTANTIVE PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Appellant further claims that the burden of proving the inapplication of the registration and licensing requirements, having been placed upon him, violated the Due Process Clause. In this connection, the Appellant has purposefully chosen to ignore the clear and concise words of *Section 1707.45*. In effect, this statute has placed the burden upon the Appellant, who claims the benefits of any exemption set forth by the legislature, to proceed and go forward with the evidence to show that the securities law does not apply to the transaction in which he has

indulged. This is a form of affirmative defense and it was, by the same Securities Act, available to him in the event that he decided to avail himself of it. For some reason known only to Appellant and his counsel, the choice was to not take advantage of it.

It is submitted that the theory of the Securities law is that the sale of securities, without a license, and the sale of unregistered securities, is unlawful. Proof of such sale raises a presumption of guilt. That presumption can be overcome by establishing, by only a preponderance of the evidence, that Appellant came within an exemption provided in the statute. Such defense, made available to one accused and found, by a presumption raised from evidence introduced, to be guilty, does not violate Appellant's constitutional rights. Such defense is analogous to the defense of insanity where, likewise, the defendant has the burden of proof.

The Appellant claims that there is no rational connection in the record between the proof and the presumption; and that, therefore, use of the statutory presumption was a violation of due process of law. Appellee submits that such claim is without merit. The record discloses a clear and rational connection between the facts proved and the ultimate fact presumed. The suggestion to this court that the presumption of guilt established in this case was derived solely from the evidence of the Sestito note-transaction, demonstrates the devious twistings and turnings of the Appellant in his effort to evade the law. The record clearly discloses how, when, where and why the Sestito note-transaction took place. The indictment, upon which the Appellant was tried, sets forth and describes only the Sestito note-transaction. Appellant has, in his brief, overlooked the testimony describing how Sestito heard about the investment opportunities in the Shott

Investment Company from automobile dealers on Reading Road; and has, for that matter, overlooked the testimony about the Shott Investment Company itself; and about the prospectus Appellant displayed to Sestito to induce and encourage him to "invest" his money. There is testimony concerning a "profit" of 12½% for an investment of 60 days duration; and testimony about being solicited to "let it ride" or "parlay it". All of such testimony was made available to the jury along with the note itself which bore the maker's name of "Shott Investment Company" by Appellant's name.

The charge of the Court consisted of the reading of the various sections of the Securities Law coupled with instructions concerning the testimony and evidence presented. It is fundamental that the function of the jury is to determine the facts and to reach a decision based upon the law. The jury, in this case, had the benefit of all of the evidence and testimony, and the law.

The situation here is not one where Appellant's liberty has been lost without having had his guilt established, and the convincing of the fact finders of such guilt.

Appellant has cited the cases of *Morrison* v. *California*, 291 U.S. 82, and *Coffin* v. *United States*, 156 U.S. 432, and hints that there are instances where the burden of going forward may be lifted by statute from the state in a criminal prosecution and cast upon the defendant. It is required that the state shall have proved enough to make it just for the defendant to be called upon to repel what has been proved with excuse or explanation. That is substantially what is involved here. The theory of the Securities Law is that any sale of unregistered securities and/or any sale of securities without a license, is unlawful. The Appellee established, and the Appellant stipulated and conceded, that the Appellant was not licensed: that the note was a

promissory note, and that the promissory note was not registered. The Appellee further established the dealing in that note between the Appellant and Sestito together with all of the other supporting evidence and testimony disclosing a sale. As such, and in accordance with the provisions of the law, Appellee established and proved enough to show the jury that the Appellant, in fact, sold an unregistered security to Sestito; and that the Appellant was not licensed. It is respectfully submitted that such proof was more than enough to make it just for the Appellant to step forward and repel what was proved with an excuse or explanation. All that was required of him was to show that one of the exceptions or exemptions was applicable. Such shifting of the burden in no way subjected the Appellant to hardship or oppression, and did not violate his constitutional rights. The claim that *Section 1707.45* violates the due process clause fails.

3. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER AND FAIR.

Lastly, the Appellant contends that he was deprived due process of law because the prosecutor, in his closing argument, was unfair; that the prosecutor was guilty of gross misconduct and stepped beyond the basic standards of fair procedure. The Appellant contends that the prosecutor "repeatedly attempted" to introduce evidence of an extended series of similar loan transactions; and the prosecutor's comments upon the failure of the Appellant to take the stand and to testify.

A reading, from the record, of the argument made by the prosecutor in this case will disclose clearly that, although he displayed earnestness and vigor, and although the blows struck by him were hard, he at no time, and in

no way, abused his position or struck blows which were foul, as the Appellant now complains.

By this attack upon the propriety of the prosecutor's argument to the jury, the Appellant infers that the integrity of the prosecutor is baseless and that his professional ethics are corrupt. A reading of the record belies this condemnation. It points up, once more, the subterfuge in which the Appellant has indulged. The transcription of the prosecutor's argument to the jury shows clearly that the prosecutor summed up the evidence presented during the trial, all of it; that he made reasonable and logical inferences from the facts proved; and that he commented to the jury on the failure of the Appellant to take the stand and testify in his own behalf. In this latter aspect, and in the light of the burden thrust upon the Appellant to carry the proof forward, it was even more incumbent upon the prosecutor to comment on the Appellant's failure to testify in his own behalf than in the usual case in which a defendant is charged with a crime. From the record, the Appellant cannot show that the prosecutor made any deliberate misstatement of facts.

CONCLUSION

This simple trial consisted of a minimum of testimony, a minimum of exhibits, a minimum of rulings by the Court and a minimum of time by the jury to decide the issues presented. The conduct of the trial was straight forward and unhurried, and the Appellant was accorded ample time and opportunity to present the jury with his approach to the issues at hand. There can be no question that the conduct of the trial, in all respects, was fair, reasonable and proper.

The ultimate question to be decided was whether or not the Appellant violated the Securities Law of Ohio by

dealing in securities without having been licensed, and/or selling a security which had not been registered. By its verdict, the jury found that the Appellant had, in fact, done both.

It is respectfully submitted that the Ohio Securities Act, challenged by the Appellant on this appeal, is not vague, ambiguous or indefinite; that it is clearly and concisely written in language that men of common intelligence can understand; that no unjust, unfair or improper presumption was created by the statutes which include a proviso for exempting entirely certain acts and/or transactions, the burden of proof of which is placed upon the party claiming the benefits; that the prosecutor's closing argument was not improper or unfair; and that the indictment, trial and conviction of the Appellant was entirely consistent with the due process clause of the Fourteenth Amendment.

For these reasons, Appellee respectfully submits that the Motion to Dismiss this appeal should be allowed and the appeal dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

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v.

STATE OF OHIO, *Appellee*.

On Appeal from the Supreme Court of the State of Ohio

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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The brief filed by the State of Ohio in support of its motion to dismiss this appeal does not even attempt to meet the arguments made by the appellant and the cases cited in support thereof. Appellee's brief slides off the critical issue—whether *as applied* the Ohio Blue Sky Law statute was unconstitutionally vague—by stating the conceded fact that forty years ago the Act withstood a broad due process-interstate commerce challenge in an appeal from a state civil proceeding. *Hall* v. *Geiger-Jones Company*, 242 U.S. 539 (1922).

But there are no cases cited to support the peculiar interpretation of the securities law by the Ohio courts in this case which in effect makes a legitimate, single, private loan, which has been fully repaid, the basis of a criminal prosecution without any showing of guilt or improper intention on the part of the appellant. Nor has the State attempted to meet appellant's argument that the statute created an unlawful statutory presumption and unconstitutionally shifted the burden of proof to the defendant.

A. Appellee's Failure to Meet, Let Alone Rebut, the Substantial Federal Questions Raised in the Jurisdictional Statement

Appellee's peculiar interpretation of the Ohio Blue Sky Law, which we attack as unconstitutional in its application, may be summarized as follows:

(1) The Ohio courts here have held that a single transaction in which money is borrowed on a promissory note is sufficient to support a conviction under the Ohio Blue Sky Law for selling non-exempt securities. However, as we have shown on page 17 of our Jurisdictional Statement, no case in any jurisdiction, including prior cases in Ohio, has ever gone that far. In *all* previous prosecutions under state securities laws, without exception, there has been proof of repeated issues of promissory notes, fraud, or the promise of the future delivery of stock or equity interest.

(2) Although the Blue Sky Law explicitly requires a knowing and intentional sale of non-exempt securities in order to constitute an offense, the Ohio courts have construed the words "knowingly and intentionally" out of the statute. Such an interpretation makes the application of the Ohio statute here particularly susceptible to a charge of void for vagueness,

as we pointed out on pages 16-17 of our Jurisdictional Statement. Thus, every borrower who makes a single personal loan violates the Act even though he honestly believed that it was an exempt transaction; for this violation, the penal sanction imposed is a one to five year term in the penitentiary, not a mere fine as imposed in many "strict liability" criminal statutes.

This standard which makes such an innocent borrower guilty is, as we demonstrated in our Jurisdictional Statement, completely vague and indefinite. Nevertheless, under the Act as interpreted, the *borrower* must come forward with proof that such standard of guilt has *not* been met. If he shows that this particular loan was the only one he ever made, he clearly meets the burden of proof. But if he shows that he has ten or fifteen notes outstanding at banks or with private lenders, no one can tell whether or not the Act has been violated since the actual state of mind of the borrower is immaterial under the Ohio decision.

If the Ohio courts had required some sort of specific intent, a showing by the State that the borrower had obtained money from a large number of people might well be sufficient evidence of criminal intent to shift the burden of proof to the borrower to show that the transaction was actually a private one. But under the Ohio courts' construction of the law that entering into a single private loan transaction may be a violation of the Act even without any criminal intent, there is no possible standard set out in the Act or any benchmark whatsoever as to what would meet the burden of proof. Suppose that the borrower, who did not know that he was committing an offense under the Act, had borrowed money from a dozen people. Would this be an offense, or would it take more? No one can tell.

(3) Under the interpretation of the Act supplied by the Ohio court, the burden of proof to show that the transaction is exempt is not met when the borrower proves that it was merely a private loan. For, on this record which was held sufficient to support a conviction, there can be no possible question as to the appellant's showing that the single transaction on which the indictment is based was a private loan from an old friend. In spite of attempts by the prosecutor to make the witness say that he was "investing" in something called the Shott Investment Company, the witness refused to cooperate. He insisted that he did not go to appellant for the purpose of making an investment. He loaned the money to appellant solely because of the high interest rate offered and his belief in appellant's ability to repay the loan. We have printed the record in full. It affirmatively shows that the transaction on which the indictment was based was exempt under Ohio law. Sestito had dropped in to visit the appellant, and his sole purpose was to make a personal call. He testified:

> Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960? A. No, sir, not that I can remember.
>
> Q. Had you telephoned to Ed? A. No, sir.
>
> Q. Or made any contact with him? A. No, sir, I just dropped in.
>
> Q. When you dropped in, was there any purpose for your dropping in on that date? A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him. (Jurisdictional Statement, App. E. 13a).

Appellant asked the witness if he wanted to make some money. He offered to borrow from the witness any sum that the witness could conveniently loan at

an interest rate of twelve and a half per cent for sixty days:

> Q. Did he ask you for any money? A. Yes, he did.
>
> Q. Did he ask you for any particular amount? A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.
>
> Q. What sounded so good? A. Well, the percentage, twelve and a half per cent. (*Id.*, p. 14a).

The whole transaction was summarized by the prosecution's witness as follows:

> Q. Actually, when you went into Mr. Shott's office on the 28th of September, Mr. Shott told you that he would like to borrow some money from you, didn't he? A. That's right.
>
> Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time? A. That's right.
>
> Q. And you trusted Ed Shott? A. That's right.
>
> Q. And you trusted his ability to pay it back to you. A. Yes, sir, I did. (*Id.*, pp. 19a-20a).

What more is required to meet the burden of proof imposed by the statute than this testimony elicited on direct and cross examination of the prosecution's witness? It was on this uncontradicted testimony that counsel for appellant felt that he had fulfilled his burden of proof. We assert that from any rational point of view counsel was justified in resting his case at this point. Appellant's counsel had established that the money was privately borrowed from a friend and had been repaid. What more did the Ohio court think should be shown to meet the burden imposed by the

statute? The prosecutor, in the face of an objection which was overruled, insisted that appellant should have gone on the stand and told the jury that the transaction was "legal." This was the way he phrased it in his closing speech:

> "Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, 'You can't get me; you can't convict me.' That is what he said.
>
> Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? Because it's illegal today, and it was illegal in September of 1960.
>
> Do you think this is a single transaction? Do you think this is the only time this occurred; that

this piece of paper, this security, was sold by Ed Shott? You have heard evidence of one—

Mr. Lloyd: I will object to that, your Honor.

The Court: Objection overruled." (Tr. Trans., pp. 49-50).

What kind of a definite standard of guilt is this? The answer is that it is no standard at all. Yet the prosecutor insists, and the Ohio courts apparently agree with him, that this was a perfectly proper standard on which to impose a one to five year sentence in the penitentiary on a lawyer who had done nothing more than borrow money from a friend and who established through cross-examination that this was a fully-repaid private loan. Under these circumstances the presumption of innocence is clear. If the State had evidence that the private loan shown on this record was part of a public offering of some kind, no competent prosecutor would have rested his entire case on an obviously innocent transaction. The fact that the State did not produce evidence of other transactions in the nature of a public offering, and instead rested the prosecution on a promissory note that had been fully repaid, clearly supports the inference there was no such evidence.

Thus, in the absence of any explicit evidence of an unregistered public offering, appellant's conviction became possible only by means of a statutory presumption which escalated evidence of the single, innocent and exempt loan transaction into proof of an unlawful, unregistered general offering of securities to the public. Its use here violates due process, because the presumption is totally irrational and wholly unsupported in common experience. Jurisdictional Statement, pp. 20-22.

And thus appellant finds himself trapped, his career ruined, facing probable disbarment proceedings and a term in the penitentiary for a major crime, because his counsel believed that an uncontradicted showing that the single promissory note was nothing more than evidence of a private loan from a friend was clearly sufficient proof that the transaction was exempt under the Ohio Blue Sky Law.

In sum, we submit that the Blue Sky Law, as applied here, was unconstitutionally vague because it provided appellant with no notice that his conduct was unlawful; that an innocent and commonplace transaction, such as borrowing money on a promissory note, cannot be made the basis of a presumption that a single private loan is part of a criminal transaction; and finally, that on this record, it was a deprivation of due process to place the burden of proof on appellant. We further submit that the burden of proof has been fully met here and that any additional evidence which the Ohio courts deem necessary to fulfill that burden is so vague and uncertain that it cannot be the basis of a criminal conviction.

All these federal questions are substantial. On this basis defendant's motion to dismiss should be denied and probable jurisdiction noted.

B. Appellee's Distortion of the Record

It is apparent from the motion to dismiss that the appellee must realize the weakness of its legal position, because there is an attempt to distort the record so that it appears that *some* evidence of a public offering of appellant's promissory notes may be inferred from witness Sestito's testimony. A reading of the evidence, the transcript of which we have printed in our Juris-

dictional Statement, will demonstrate that the State neither proved nor attempted to prove more than the single, private Sestito promissory transaction. Nevertheless, on pages 4 and 5 of appellee's brief we find this highly inaccurate summary of Sestito's testimony:

> "Patrick Sestito, a resident of Cincinnati, Ohio, testified that he, in the latter part of the summer of 1960, heard about investment opportunities with the Appellant from certain car dealers on Reading Road (T-27). On September 28, 1960, Sestito had two thousand ($2000.00) dollars in his pocket and went to Appellant's law office. He had not been in previous contact with Appellant, nor had he been contacted by Appellant in any manner. Sestito and Appellant had a discussion about the investing of Sestito's money in buildings and financing (T-18, 19). At that time Appellant explained the workings of the Shott Investment Company and showed Sestito a draft of the progress and development of the Shott Investment Company. Although intending only to invest one thousand ($1000.00) dollars, Sestito delivered over two thousand ($2000.00) dollars to Appellant because 'it sounded so good.' (T-20). Sestito was satisfied with the 12½ per cent profits for 60 days, which Appellant offered him. Upon payment to him of the money, Appellant presented Sestito with a promissory note (T-21). . . ."

1. The first three sentences of the above summary attempt to give the impression that Sestito had never been in previous contact with the appellant, that he had heard about investment opportunities which appellant was offering and went to appellant's office to take advantage of them. To the contrary, the record unambiguously shows that Sestito was an old friend and client of appellant and that he was merely making a social call on appellant on the day in question. (Ap-

pellant's Jurisdictional Statement, App. E, 12a, 15a). When the prosecution tried to get Sestito to say that he went to the office for the purpose of lending money to appellant, the witness denied any such purpose.

> Q. Was that part of the money you had in your pocket?
> A. Yes, sir.
> Q. Was that the reason you went to that office?
> A. Well, I mean not necessarily. It was just more or less, you know, just a social call, just to stop in and say hello. (Jurisdictional Statement, App. E, 15a).

2. The balance of the statement is an even worse distortion of the evidence. Appellee's contention that appellant explained to Sestito the workings of the Shott Investment Company as an inducement to loan money has no basis in the record. As we pointed out in our opening brief, the Company was a partnership formed by appellant for completely legitimate tax purposes. Jurisdictional Statement, p. 7, note 6. The only further explanation of the Company is contained in this excerpt of the record:

> Q. And what was it that Mr. Shott told you about the company and the investments that were being made?
> A. Well, I mean, of course, naturally I asked him if I could check it out and, of course, knowing Mr. Shott I figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing it in buildings and financing. I know finance companies make a lot of money. I do know that.
> Q. Did he say who was investing it in buildings and financing and making a lot of money?
> A. No, sir, he didn't state that. (*Id.*, pp. 13a-14a).

It should be emphasized that there was not one word in the record about "the investing of Sestito's money in buildings and financing," as asserted by appellee. To the contrary, Sestito said that he loaned appellant money because of the interest rate and that for security he relied solely on the personal credit of appellant. He neither thought he was getting nor attempted to secure an equity interest in any construction or finance firm; he was making a single personal loan.

3. Appellee goes on to say that Shott showed Sestito a "draft of the progress and development of the Shott Investment Company." There is no such evidence. When the prosecuting attorney attempted to show that Sestito relied upon an alleged progress report of the Company, Sestito clearly negated any inference that he was moved by any report. Apparently, what was handed the witness was not a progress report but merely a credit statement. The witness disregarded it because he had faith in Appellant Shott's ability to repay the loan; it was solely on Shott's reputation and credit that Sestito loaned him the two thousand dollars. (Jurisdictional Statement, App. E, 19a-20a). The testimony on the credit statement is as follows:

> Q. Let me ask you if in the course of your conversations about the Shott Investment Company, that you had with Mr. Shott on that day in his office, he showed you anything about the company?
>
> A. Well, yes, he showed me, oh, I don't know what you would call it. An eight and a half by eleven stationery, plaque more or less, showing about these Shott investments.
>
> Q. What do you mean showing about the Shott investments?
>
> A. Of course, I couldn't read it. I couldn't remember it. It told about the company, Shott's investments.

Q. Did it have writing or figures or what did it contain?

A. Well, it just stated, you know, like—told about the company, like it's been in effect since—of course, I couldn't remember the date. I think it said something like 1955.

Q. Did it say anything about the investments that were being made?

A. Well, sir, I can't remember that. I just glanced at it and didn't study it too much.

Q. After you read that, did Mr. Shott make any other explanations to you about how the company operated or what was happening to the money?

A. No. Of course, he specified to report it to the—of course, I asked him—of course, I figured it was legitimate because I mean he being a lawyer, it was straight up and down. And he says report it to the income tax. And, of course, naturally when he said that I figured it was all right. (Jurisdictional Statement, App. E, 14a-15a).

4. Appellee's distorted summary of the record attempts to convey the impression that it was after reading from a "prospectus" of the Shott Investment Company that Sestito determined to double the loan which he intended originally to make. In the first place, as we pointed out above, there was no evidence of, nor was there in fact, any "prospectus." Further, no written document of any sort induced Sestito to loan money. Nevertheless, appellee asserts: "Although intending only to invest one thousand ($1000.00) dollars, Sestito delivered over two thousand ($2000.00) dollars to Appellant because 'it sounded so good.'" The "it" in appellee's brief clearly refers to the alleged prospectus. The inexcusable character of this distortion of the record is shown by the following excerpt which demonstrates that the "it" does not refer to some

alleged "prospectus" but to the interest rate which Appellant Shott offered to Sestito.

Q. Did he ask you for any particular amount?

A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good?

A. Well, the percentage, twelve and a half per cent. (*Id.*, p. 14a).

Sestito's testimony in this case is only a few pages long. We have printed it in its entirety. Although appellee has scattered through his brief inflammatory mischaracterizations like "prospectus" and "investing in buildings and finance," reference to the record will amply demonstrate that the transaction was, as we have asserted, nothing more than a single, innocent, exempt personal loan which has been fully repaid. As we pointed out in our Jurisdictional Statement, this single event has never, and cannot constitutionally, constitute the criminal "sale of a security" or criminally "dealing in securities" within the terms of the Ohio Blue Sky Law. Nor can this innocent, exempt conduct serve as the basis of a presumption of a criminal offering of unregistered securities or serve to shift the ultimate burden of proof to the defendant in this criminal case. All these issues present substantial federal questions.

C. Conclusion

For the reasons stated above, this Court should deny Appellee's Motion to Dismiss and should note probable jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 877

EDGAR I. SHOTT, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal From the Supreme Court of the State of Ohio

PETITION FOR REHEARING

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On Appeal From the Supreme Court of the State of Ohio

PETITION FOR REHEARING

On May 13, 1963, in a per curiam opinion in which Mr. Justice Black dissented, this appeal of Edgar I. Shott, Jr., was dismissed and his petition for a writ of certiorari denied. In his original appeal appellant relied principally on the contention that the statute was so vaguely indefinite that it failed to provide notice to appellant that his conduct was unlawful; and furthermore, as applied by the Ohio courts, it improperly and unconstitutionally placed the burden of proof upon appellant and created an invalid statutory presumption.

QUESTION PRESENTED ON REHEARING

In this criminal case for a technical violation of the Ohio Securities Law, where the prosecution produced no evidence whatsoever that was not consistent with the innocence of the appellant, the prosecutor in his closing argument told the jury (over objection) that appellant's failure to take the stand showed his guilt because he failed to prove to the jury that his actions were "legal" and "complied with the law" and were not "illegal today." Previous to appellant's trial there had been widespread publicity connecting appellant with the indictment and conviction of a third party who had defrauded the public out of about $3,500,000.

The question is whether under these circumstances, due process is denied by the statement of the prosecutor that the appellant must be guilty because he failed to prove that his actions were "legal" or to disprove the fact that they were "illegal today," a phrase which goes beyond the indictment and includes the adverse publicity current at the time of the trial linking the defendant to the fraud of a third party.

RESTATEMENT OF THE CASE ON REHEARING

In his petition for rehearing appellant desires to present an additional consideration which we think demonstrates that appellant did not and could not get a fair trial in the Ohio courts. That consideration relates to the publicity which linked appellant Shott with the fraud of a defendant, one Stickler, who was tried in another case which was a cause celebre occupying the headlines of the Cincinnati papers for weeks prior to appellant Shott's trial. Stickler was the architect

of a Ponzi scheme to defraud Cincinnati investors. He would borrow money at rates of interest up to twenty-five percent; he would pay off the old loans with new money. His scheme finally collapsed but not until Stickler had taken more than $3,500,000 from credulous investors.

The indictment of Stickler came down in a blaze of publicity making headlines across the front pages of Cincinnati papers. As appears from the Appendix attached to this petition, the public was informed by the Cincinnati papers as follows:

> "The Hamilton County grand jury today indicted four persons for participation in the $3.5 million loan kiting scheme reportedly created by Leslie Stickler, of 6825 West Farm Acres Drive, Amberley Village."

Appellant Shott's picture was placed under Stickler's as a party to this fraud. The *Cincinnati Enquirer* carried a headline:

> "Lawyers charged in $4 million fraud here. FBI asserts hundreds hit in phony scheme."

The publicity continued day after day. In a large part of this publicity appellant Shott was directly connected by the newspapers with Stickler. Therefore, at the time this case was tried, appellant Shott was clearly identified in the public mind as a participant in a monumental scheme to defraud.

One week before appellant Shott's trial, Stickler was tried and convicted. Witnesses whose testimony was widely publicized identified Shott as one of the persons who was gathering money for Stickler. For ex-

ample, a witness in Stickler's trial was reported to have testified as follows:

> "Steffen testified that he gave Stickler $5,000 in cash for the second note. *He said he first started investing money with Shott and knew that Shott was turning the money over to Stickler.* The money, he understood, was being loaned to contractors in Lebanon, Portsmouth and Columbus, who were willing to pay a high percentage of interest for funds to finish their building.
>
> "He switched to Stickler, Steffen testified, because he understood that Shott 'was supposed to have said he was now paying everybody off,' and because he, Steffen, wanted to eliminate the 'middle man.' Steffen claimed that he and Shott had been splitting 35% interest on the money."

Four people were indicted in the state criminal action: Stickler himself; Edgar I. Shott, Jr., the appellant in this case; John Ruf, a bookkeeper; and Richard Brauer. The front page newspaper story concerning these four indictments read in part as follows:

> "Stickler is believed to have borrowed money to cover earlier loans and to have promised high interest rates in order to get it. He repaid old loans—at high interest—by borrowing more and more money at rates ranging up to 25 per cent. Some of these loans—supposedly made as investments with Stickler—were arranged by intermediaries. *The three men indicted with Stickler today are accused of being the go-betweens.*
>
> "C. Watson Hover, prosecutor, says his office called more than 50 witnesses before the grand jury. The cases in the indictments brought today, he said, involve transactions of about $250,000."

If the Court will examine the contemporary clippings which we have set out in the Appendix to this petition, it could only conclude that at the time of appellant Shott's trial, the public and presumably the jurors must have got the general impression that Shott participated with Stickler in defrauding the public.

However, Shott was not charged with participating in the notorious fraudulent scheme of Stickler. Nor was there a scintilla of evidence to that effect other than the impression given in the press from the fact that he had been indicted along with Stickler. Indeed, he was totally unaware of Stickler's machinations. Shott himself lost more than $70,000 in loans that he had, in good faith, placed with Stickler. All that the Shott indictment charged and all that the evidence showed was that Shott had borrowed money from a friend on a promissory note which he had repaid.

Therefore the only basis for the jury's impulse to convict appellant of a serious felony sufficient to support a sentence of one to five years in the penitentiary must have been the prosecutor's comment to the jury on Shott's failure to take the stand. Taken in connection with the publicity which the jury must have read, this highly emotional comment could only mean one thing, and that was that Shott was unable to explain the legality or the propriety of his connection with Stickler's fraudulent scheme. That comment was:

> "Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, 'You can't get me; you can't convict me.' That is what he said.

"Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He wll not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? Because it's illegal today, and it was illegal in September of 1960." (Tr. Trans., pp. 49-50).

We are not contesting here the principle that it is a violation of the Federal Constitution for a state to permit its prosecutors to comment on the failure of a defendant to take the stand (*Cf., Adamson* v. *California*, 332 U.S. 46 (1947); *but cf., Malloy* v. *Hogan*, No. 1031, certiorari granted, June 1, 1963). We are suggesting, however, that this is a dangerous principle and should be limited to cases where there is evidence to be explained which is clearly inconsistent with the defendant's innocence. In this case there is *nothing* in the entire record which is inconsistent with the innocence of the defendant.

Failure to take the stand should not, and cannot under *Adamson, id.* at p. 58, constitute the sole basis

for sustaining a conviction. There must be something in the record inconsistent with the innocence of the defendant to support a conviction in a felony case. Here there is nothing. But at the very least, and this is the point we make on rehearing, in a cause celebre accompanied by widespread publicity where the newspapers' publicity may have given the jury reason to believe that the defendant might have been engaged in a criminal conspiracy, the prosecutor should not be able to ask for a conviction for the following reason:

> "But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? *Because it's illegal today,* and it was illegal in September of 1960." (Tr. Trans. p. 50).

The underlined phrase can only refer to the transactions which appeared in the newspapers after the exposure of Stickler. It cannot refer to anything in the indictment. It is particularly important that in the case of great publicity that comment upon the defendant's failure to take the stand should not be so broad as to condemn him for not explaining matters beyond the scope even of the indictment and which the jury could only have learned of through the newspapers.

CONCLUSION AND CERTIFICATE

For the foregoing reasons, the Petition for Rehearing should be granted, appellee's motion to dismiss denied, and probable jurisdiction noted. This Petition is presented in good faith and not for delay.

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